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COUNTER STATEMENT OF CASE

The history of the several proceedings before The Public Service Commission of the Commonwealth of Pennsylvania dealing with the rates of the Clark's Ferry Bridge Company is amply set forth in the reports of the Commission (Record 15a et seq. and 485a et seq., and 8 Pa. P. S. C. 61 and 11 Pa. P. S. C. 222), the opinion of the Superior Court of the Commonwealth (Record 824 et seq. and 108 Pa. Superior Ct. 49) and in Appellant's Brief. Certain facts are of sufficient importance, however, to warrant brief restatement.

The original bridge over the Susquehanna River at the point of confluence of the Juniata River or Clarks Ferry, a point about 14 miles north of the City of Harrisburg and 39 miles south of Sunbury was completed by the State in 1829. (Record 486a, 511a, 776a). The bridge was at one time part of the state canal system having a towpath constructed upon it to assist canal boats across the river, and, with the entire state canal system, passed in 1857 into the possession of The Pennsylvania Railroad Company (Record 777a). The canal system having passed into disuse and the railroad company not being generally in the bridge business, the company in 1915 sold the existing bridge and some other property to an individual, one of four incorporators of the present Appellant (Record 512a). Appellant's Brief on page 2 refers to this as a foreclosure sale allowed by the owner to occur rather than expend the money for necessary repairs. No reference to the

record is given to support this statement, and we know of none and believe it to be inaccurate.

The proceeding before the Commission from which this appeal arose is the third case dealing with the rates charged by this Appellant. The first of these culminated in the Commission's order of June 8, 1926, (Record 485a et seq.) finding excessive the then existing rates, 25 cents for ordinary vehicles, determining the fair value of the property as of that date for rate-making purposes and fixing a maximum gross revenue. A second complaint was filed with the Commission on April 22, 1929, in the face of which Appellant made a further and "voluntary" reduction in its rates. The third proceeding was instituted by the Commission on its own motion on January 14, 1930.

The record in the first case was formally offered in evidence in the third and present case and is now before this Court along with the new evidence produced. The record in the second case is not here involved.

The first complaint was filed on August 11, 1925, close upon the opening of the present bridge on May 30, 1925. The conclusions reached were based on a full record in which Appellant had ample opportunity to present whatever evidence it then desired in order to establish the fair value of its property for rate making purposes. The Commission in that proceeding had an unusual opportunity to base its valuation on current actual costs as contrasted with mere estimates. The making of a valuation at the present

time is consequently a repetition of work done previously under circumstances much more conducive to sound results.

The Commission's finding of value of 1926 was $767,800 and the total gross revenue which it allowed as reasonable was $85,905 (Record 506a). The particular items which Appellant now alleges were erroneously treated in that proceeding were contested then and the Commission's rulings in regard to them were in no sense ex parte or assumptions without full evidence. Appellant's present claims that the contractor's losses should be added to its actual cost of the bridge to determine its value, that it should be allowed something over and above the reproduction cost of its property for the special value of its head lands as bridge sites and that it should be given an additional allowance for something called attached business value were all considered and passed upon by the Commission in the old proceeding, were determined against Appellant and abandoned by it when it withdrew its appeal therefrom in the early Spring of 1927.

Appellant argued in the Superior Court in this appeal that this withdrawal of its old appeal after argument was without "conceding the propriety or legality of the Commission's order at the time it was made, or assenting to the valuation of its property fixed by the Commission." How this is legally possible is not quite clear. Certainly upon the withdrawal of the appeal Appellant filed its reduced rates (15 cents for ordinary pleasure cars), purporting to show that they would produce the gross revenue which had been fixed by the

Commission. As far as is shown by this or any other record, Appellant in 1927 submitted to the findings of the Commission as to both value and allowable revenues. Counsel likewise states in the present Brief (page 5) that the increase in the volume of business had become so great that the reduction in rate could be made without loss of the return which Appellant claimed. The discontinuance of the appeal may have been partly on this account as is intimated, but the comments of the judges, made from the bench during the oral argument in the case and giving some indication of their estimation of its merit, may also have had something to do with Appellant's decision to do so.

Subsequent to the discontinuance of the appeal Appellant's revenues continued to mount, so that beginning in 1928 they have approximated $135,000 per year even though in 1929 the rate on ordinary pleasure cars was reduced from 15 cents to 10 cents. The revenues were:

1927	$122,805
1928	135,499
1929	141,538
1930	130,314
1931	137,288

The revenues for 1931 are not stated in the Appendix to Appellant's Brief along with those of previous years (page 109) although they are equally a part of this record (Record 483a, 484a, 810-819). Appellant has apparently not felt the effects of the depression whatsoever.

The only new evidence which Appellant offered in

the present proceeding was that of its appraisal engineers, members of the staff of the American Appraisal Company. No new evidence was submitted on the cost or value as of 1926. Notwithstanding the increases in their estimated figures these witnesses admitted on cross-examination what is so well known as to be within the judicial knowledge of the Commission and this Court that construction costs of such property were substantially the same in 1929 as or slightly less than in 1925 (Record 109a):

> "Q. As an appraisal engineer would you say it costs more to place concrete today than it did in 1924 and 1925?
> "A. I would say that there was probably not much change.
> "Q. In which way?
> "A. Well, your sand and stone has not changed; the cement has probably dropped a little; labor was probably higher last fall than in 1924.
> "Q. Are you speaking in general of labor in the vicinity of Harrisburg?
> "A. In the vicinity of Harrisburg."
>
> * * *
>
> "Q. Has the science of handling concrete progressed to an extent that would make it cheaper to build it now than it was then?
> "A. Well, on this particular type of construction I would say not."

The truth of this admission was subsequently conclusively corroborated by charts of unit prices presented by the Commission's engineer (Record 471a, 472a) covering both local labor rates and general and specific construction cost indices. These show that in 1924, when the construction contract was let, the En-

gineering News Record, a standard technical magazine, reported construction prices as being 215% of the 1913 level, on September 1, 1929, when Appellant's appraisal was made, 208% of the 1913 level, and during the last three months of 1930, about 198%. A similar index figure published by Appellant's own appraisers shows the same condition with an even greater drop in 1930.

Appellant's contention is therefore, not so much that the bridge property's fair value is now greater than it was in 1925 or 1926, as it is primarily that the bridge was worth in 1925 substantially more then it cost Appellant. Counsel stated this clearly in the brief to the Superior Court (pages 120 and 121) as that Court quoted in its opinion (Record 833):

> "The difference does not arise out of a change in price levels; but from the fact that the Company at the time of the construction of the bridge obtained its property for less than cost, or fair value."

The question of primary importance in the appeal consequently bears upon the weight to be attached by this Court to the Commission's finding of fair value of 1926 as compared to the estimates of value made by Appellant's appraisers hired for the purpose in 1929.

ARGUMENT

I.

THE VALUATION PLACED BY THE COMMISSION AND THE SUPERIOR COURT UPON APPELLANT'S PROPERTY DOES NOT INVOLVE THE TAKING OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

1. Neither the Commission nor the Superior Court treated the valuation of Appellant's property as res judicata upon the Appellant in this proceeding.

The Brief of the Appellant, filed in this Court, contains the statement in italics (page 10) that "the order of the Commission and the judgment of the Superior Court treated the valuation of appellant's property, made in 1925 in a prior proceeding, as res judicata and as conclusive upon the appellant in this proceeding." We cannot accept this as a correct statement of what has been done. The value of Appellant's property was not considered res judicata in this proceeding. If either the Superior Court or the Commission did so treat the valuation of Appellant's property, they at no time said so expressly, and the fact can only be inferred from other things stated or from the conclusions reached. However, neither the statements of principle nor the conclusions bear out this charge made by Appellant.

The Public Service Commission in presenting its case at the first hearing in the investigation instituted in January, 1930, presented in evidence not only its

report and order of 1926, but also accounting studies of the books of the Company to show any additions to or retirements from the property since that time, together with operating revenues and expenses during the intervening years. Had the Commission been contending that the prior determination was conclusive of the value of the property in 1930, there would have been no need to make and submit these accounting studies of additions and betterments and deductions for retirements. (Actually, it developed there were none.) That the Commission felt the necessity of presenting evidence on these matters indicates that it did not then so construe its prior order.

The report and order of the Commission of February 2, 1932 (Record 15a-35a), from which its line of reasoning should be apparent, recited at some length the history of the prior proceedings before it, and the basis on which its case had been presented at hearing (Record 15a-20a). It pointed out that evidence had been received as to what changes, if any, had occurred during the intervening years, and called attention to the fact that the present Appellant had attempted in argument to overcome the effect of the prior decision by reraising the various contentions which it had made to the Commission in 1926 in the prior proceeding (Record 20a, 21a). Following this, there appears at somewhat more length than their merit warrants a review of the various differences of opinion of the engineers in their estimates of the cost to reconstruct the bridge new at this time (Record 21a-29a). Then follows a paragraph in conclusion of the question of value, which is quoted only in part in the Brief of Appellant (page

10), and which, we submit, is of importance to this Court in determining what the Public Service Commission was attempting to do in this proceeding (Record 29a, 30a):

> "As has already been noted the valuation of the property in 1926 was made chiefly on actual cost figures adequately supported by testimony of engineers. The present claim of increased value is based on non-competitive estimates of appraisers whose business it is to make such estimates. In the face of their figures the evidence is that construction costs and methods have not increased in the interval. Any necessity of reconciling their estimate with the actual prior figures is disclaimed by these witnesses. *In the interval since the prior valuation, the Commission could not assume without investigation that capital investment and operating cost had not changed so as to affect the level of reasonable rates.* We have now made such a study of the property. *Having made a complete valuation of this property in 1926 and having ascertained that cost conditions have not changed materially since that time, the Commission is of the opinion that it is not required to reopen the entire question of valuation merely because the company concerned desires it. Nor is there anything in the evidence adduced which is persuasive that in this particular case justice requires a reopening of the prior valuation. Upon a complete examination of the entire record in both proceedings, the Commission is of the opinion and finds that the fair value of the property of the Clark's Ferry Bridge Company is still $767,800 as of this time.* (Italics ours)".

There is in this paragraph of the report a definite concession that the value of the property in 1930 was

not a thing adjudicated, and a further statement that the findings of 1926 were final even as to value in 1926 only after a check of the whole record to see if there were evidence of changed conditions since that date or evidence indicating a probability of error in the former determination.

The Superior Court of the Commonwealth likewise so understood the intent of the Commission and rejected expressly the contention made by Appellant to it, as now in this Court, that the Commission had attempted to make the finding of 1926 conclusive upon Appellant of the value of its property now. The Court stated (Record 830):

> *"We, however, do not understand the report of the commission in this proceeding to mean that it treated its findings in 1926 as necessarily conclusive upon the issues raised by appellant in the present inquiry.* * * * That statement [as to the conclusiveness of the previous finding] obviously refers to the effect of the withdrawal by appellant of its appeal from the order of June 8, 1926, and the filing of the tariff therein prescribed; it correctly describes the situation as it existed immediately after the withdrawal of the appeal. When the subsequent complaints were filed, *the commission evidently did not consider its previous findings as barring appellant from raising the question of the fair value of its property in 1930* and the proper allowances to be made for operating expenses and depreciation, but instituted an investigation, and, as already stated, admitted in evidence appellant's reproduction cost estimate and its supporting testimony, and put in evidence the reproduction cost estimate of one of its engin-

eering staff, and the report of the result of an examination of appellant's books and records. (Italics ours)."

Then followed (Record 831, 832) several quotations from the order of The Public Service Commission, closing with that which has just been quoted. The Court then says (Record 832, 833):

"In our opinion, these excerpts from the report of the commission demonstrate it took the position in the present proceeding that, although the technical burden of proof was not upon appellant, yet, in view of the history of the 1926 inquiry, appellant did have the burden of supporting its contention that conditions had so changed between 1926 and 1931 that its present reproduction cost estimate was a better index of fair value than was proof of the actual original cost of its property. * * * In brief, we have the situation. The commission made a finding of value in June, 1926, from which appellant appealed but subsequently abandoned its appeal; the finding thereupon become conclusive for a reasonable period of time. Probably no general rule could be formulated with relation to just when it became the duty of the commission to make a new valuation of the property of a utility. Under such precedents as City of Phila. *v.* Public Ser. Com. 83 Pa. Superior Ct. 8; Same *v.* Same, 84 Pa. Superior Ct. 135; Kittanning Tel. Co. *v.* Pub. Ser. Com. 78 Pa. Superior Ct. 436; City of Erie *v.* Pub. Ser. Com. 103 Pa. Superiod Ct. 59; and New Street Bridge Co. *v.* Pub. Ser. Com., 271 Pa. 19, it may be said that when conditions have changed materially, or price levels have fallen or risen to a marked degree, since a prior investigation, the commission should again go into the question of value. The important ques-

tion here was whether appellant's evidence showed such changes in conditions or price levels as to make it the duty of the commission to revalue the property.

"In arguing that the commission ignored the settled proposition of law that a public service company is entitled to earn a fair return upon the present fair value of its property, regardless of what the original cost of that property may have been, counsel for appellant say in their brief that the 'difference (for which they contend) does not arise out of a change in price levels; but from the fact that the company at the time of the construction of the bridge obtained its property for less than cost, or fair value.' The same contention was made in the former proceeding; the burden of appellant's present complaint seems to be, not that conditions or price levels have so changed as to require a new valuation, but that the original valuation by the commission was too low. This argument seems to ignore the legal effect of the withdrawal by appellant of its appeal from that valuation."

The basis of the decisions of the Commission and the Superior Court was, therefore, that a finding of fair value of the property devoted to public service was made in 1926, and that upon the withdrawal of the appeal therefrom in 1927 that finding became binding upon the Company as to the value of the property at that time, but was not conclusive of the value in 1930 or 1933. Both the Commission and the Court regarded the finding as conclusive on the Company of the value of the property in 1926, only as long as no persuasive evidence was offered to show that the finding had been made through error or misunderstanding.

The finding of value of 1926 was, moreover, taken to be strongly persuasive of the value of the property in 1930 and 1933 until some evidence of changed conditions or other factors might indicate a need of a complete new valuation. Additional evidence was received by the Commission and considered by it and the Superior Court as to reproduction cost for the years 1929 and 1930, but this evidence was rejected on its own merit, or lack of merit, when placed against the conclusion reached in 1926 and the evidence of record in support of it.

2. The finding of fair value made by the Commission in 1926 should be treated by this Court as binding upon Appellant in this proceeding as to what the value of the property was in 1926.

(a) *Appellant had full opportunity to raise promptly in either Federal or State courts any objection it had to the determination of the Commission and had clearly before it the statutory consequences of its decision not to do so.*

The Public Service Company Law of Pennsylvania (Act of 1913, P. L. 1374; Purdon Penna. Stat., Title 66), provides a number of ways in which a decision of the Commission can be questioned, but new proceedings of the same nature are not one of them. In Article III, Section 1 (d) of the act (66 Purdon Penna. Stat., Sec. 154) a public service company is authorized to apply to the Commission by complaint for relief from any general order or ruling which it deems unjust to it. Article VI, Section 14 (66 Purdon Penna. Stat., Sec. 791) authorizes the filing of petitions for

rehearing within fifteen days from date of service of any order. Article VI, Section 12 of the act (66 Purdon Penna. Stat., Sec. 773) provides for rescission or modification of any findings of the Commission which subsequently appear to have been ill advised. In Article V, Section 27 (66 Purdon Penna. Stat., Sec. 691) the Commission's powers are stated to include the rescission and modification of its orders, presumably whenever conditions require it. In Article VI, Section 31 (Purdon Penna. Stat., Sec. 881) reference is made to the use of injunctive process in the State courts of common pleas to prevent enforcement of any unjust order, as follows:

> "No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of Common Pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the Commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act *the same shall be and remain conclusive upon all parties affected thereby,* unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act. (Italics ours)"

The Court will thus readily see that the statutory set-up in Pennsylvania gives the public service company ample opportunity to have every question affecting its rights thrashed out thoroughly before a decision binding upon it can be reached, yet, on the other

hand, the section of the act quoted above provides in unmistakable terms that unless the company avails itself of its opportunities, the decisions of the Commission shall be conclusive upon it. The Commission, however, does not harbor an impression that the Commonwealth of Pennsylvania may preclude any party from presenting to the Federal Courts any contention which he may have that the acts of the authorities of the Commonwealth infringe upon those rights which are protected by the Constitution of the United States.

The review of decisions of the Public Service Commission, which is provided in the courts of the State, has already been considered by this Court; *Ohio Valley Water Company* v. *Ben Avon Borough et al.*, 253 U. S. 287, 291, 64 L. ed. 908, 40 S. Ct. 527 (1920), and has been determined to be a judicial proceeding in which the Superior Court makes its determination whether confiscation has occurred upon its own independent judgment as to both law and facts: *Ohio Valley Water Company* v. *Ben Avon Borough*, 75 Pa. Superior Ct. 290 (1921) and 271 Pa. 346 (1921). The action of the Commission in 1926 was consequently the final legislative action. Appellant could then, at its option, have appealed to the State's judicial authorities as provided in the statute and thence to this Court, or it might have proceeded in equity in the proper United States District Court in defiance of the statute, and thence presented its claim in this Court. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210; 53 L. ed. 150; 29 S. Ct. 67, quoted at length by Appellant, and the line of cases which follow it, go no further. They do not hold that a

company may go into court years afterward where no new facts have developed to change the basis of the decision. In first taking its appeal to the State court and then seeking a voluntary non pros of it, Appellant submitted to the Commission's action without a formal judicial decision being rendered. The Commission consequently based its decision in 1932, not on the theory that a judicial decision had rendered all matters decided in 1926 res judicata, but on the provision of the statute that a legislative decision of the Commission, not upset by subsequent judicial action, became conclusive on the parties affected. Appellant had had ample opportunity to attack the decision but had abandoned its attempt to do so.

(b) *The provision of the statute that commission decisions not appealed become conclusive is eminently fair.*

The provision of the statute making determinations and orders of the Commission conclusive has been construed judicially in Pennsylvania in a way which is absolutely fair to the companies involved and to this Appellant. In *Ford City Borough* v. *Kittanning Telephone Co.*, 4 Pa. P. S. C. 777 (1920) affirmed in *Kittanning Telephone Co.* v. *Public Service Commission*, 77 Pa. Superior Ct. 86 (1921) the Commission found the rates of the telephone company excessive and ordered a reduction. The record contained no evidence of property values beyond book records of cost and the company's case was based wholly on the increases in costs of operation. Subsequent to the decision the company procured a reproduction cost estimate of its

property and sought permission to increase its rates based on the value shown. This the Commission refused, holding that its determination of the rates of the company was conclusive upon it. The Superior Court, however, reversed the decision of the Commission: *Kittanning Telephone Company* v. *Public Service Commission* 78 Pa. Superior Ct. 436 (1922). The Court there said (pages 441 and 442):

> "It is well settled that the commission has no power to fix or determine a rate that is confiscatory. All orders of the commission in so far as they relate to rates to be collected in the future must of necessity be to some extent experimental. If such rates, so determined by the commission, actually result in exorbitant profits to the utility company, any consumer can complain to the commission and if the rate is proven to have resulted in injustice to the public it can be reduced within the three-year period. On the other hand, if the actual results of operation show that a rate fixed by the commission is confiscatory of the company's property, it is entitled to have it revised and the provisions of article II, clause 1 (f) are no bar to such revision within three years. If they were they would be in contravention of the fourteenth amendment to the Federal Constitution, for if the State cannot fix a rate so low as to amount to confiscation of property, it cannot provide for a three-year confiscation of such property.
>
> *Whenever a utility company,* either under the provisions of article II, section 1 (f) or of article III, section 1 (d) *presents its petition alleging that the rates fixed by the commission as just and reasonable have proven to be confiscatory, it is the duty of the commission to set a hearing and afford the company opportunity to prove its allegations, and if on the whole evidence, it appear that the*

> *rates so fixed have in actual operation worked confiscation of the company's property, to revise them irrespective of the time that has elapsed since its former determination.*"

The law of Pennsylvania is therefore applied with the principle in mind that confiscation of property must always be avoided, and no matter what the provisions of the statute; if a public utility submits to the Commission evidence indicating a probability that prior decisions produce this result they must be reopened and their basis reexamined. Hence it follows that when in the present case the findings of value of 1926 were adopted without reopening and made the basis of the decision in 1932, this was done only because Appellant could offer no substantial reason why it should not be done.

(c) *The objections which Appellant raises to the findings and conclusions of 1926 are not substantial.*

There were two objections to the finding of values in 1926 open to Appellant in this case. It might have shown, if it could, that subsequent developments had made the finding inapplicable now. This it did not choose to do, as has been noted and was remarked by the Superior Court in its opinion (Record 833). Rather, Appellant chose to attack the soundness of the 1926 findings when made and brought up several criticisms of them.

Appellant now condemns the finding of value in 1926 as having been one based on original cost rather than

estimates of the cost to reproduce the property. This is of course incorrect in fact as to the portions of the property retained from the old bridge structure, but they are so small in amount that this fact may be ignored. As to the greater part of the property the statement is true in fact, but the evil result assumed does not follow. Let us remember the dates involved. The contract was let in June of 1924 (Record 513a), the bridge was opened to traffic on May 30, 1925, (Record 513a), the engineer's final certificate of work done signed as of July 3, 1925 (Record 463a, 464a), the rate proceeding was begun August 11, 1925, less than six weeks later, and the decision rendered on June 26, 1926 (Record 506a), less than a year after the completion of the construction work and final payment of the contractor. Remembering that the first hearings on the complaint must have been held in the Autumn of 1925, what earthly use could there have been in substituting the mere estimates of professional appraisers when actual data of practically contemporaneous work was at hand? Could the estimates have differed one iota from the original cost and still have been credible?

The actual cost records of Appellant's property in 1925 are unassailable as evidence of fair value in 1926. Whether they are still the best evidence of value now is another question which will be discussed below, but certainly the conclusions of 1926 cannot be discredited because not based on reproduction cost estimates.

Appellant has three specific objections to the finding of value in 1926:—

(1) The bridge structure cost more than the contract price, so that the contractor had an out-of-pocket loss of $143,140. From this Appellant reasons that the *value* of its bridge is equal to the contract price plus the contractor's losses. Of course, this theory makes no allowance for the possibility the contractor may have used bad judgment or that the bridge may not be worth what it *cost* to build it.

There are several fallacies in this argument of Appellant. The first one is that no one knows what it did cost the contractor to build the bridge. He kept his books to suit himself and how he allocated his equipment costs to his various projects and how he charged off depreciation are matters wholly beyond our ken. A finding of fair value could not properly be rested merely on the statement of a contractor's accountant that money had been lost on the work. The Commission could not check it by examining the books. Again, the contract contained a clause providing for a bonus of $150 a day for each day the work was completed before a fixed date. Who knows what errors of judgment may have been made, in the haste which pushed the work to completion 147 days before that date?

As a matter of fact the losses which were suffered may be attributed to a decision of the contractor which proved to be a mistake. The loss was in fact due to a flood in the river which occurred on September 28, 1924, and which washed out a large part of the equipment and timber work. It is quite possible that, had the coffer-dams been made higher and stronger this might not have occurred. It is significant that except

for this flood the contractor's auditor, Reinhard, says he would have made money (Record 610a, 611a):

> "Q. How does it happen then that you lost money on the Clark's Ferry Bridge?
>
> "A. On the 28th day of September, if you remember there arose a flood, one of the highest waters they had in September. We figured on getting out of the river before any high water, of course, we had some high water to our sorrow, and this is the tale, we would have made money probably if things would have gone along smoothly without any high water. We had high water in July, another unusual thing in this river.
>
> "Q. Then the cost to you over what would ordinarily have been your cost was due to an unforseen high state of the river?
>
> "A. Yes, it would have been to anybody".

Appellant calculates this direct loss at $61,140.90, on labor and materials lost and $82,000 on equipment and overheads. Originally Appellant also asked for an additional $70,000, being the contractor's expected profit, making a total of $213,140. Since the coffer-dams were only estimated at about $30,000, it would seem that if possible an extra $20,000 had been spent on them the loss could have been averted. In such a case the proper amount to add to the bid price to find the cost to build the bridge in a safe manner would be the $20,000 and not the $213,000. The difference should be charged off as a loss due to incompetency. The comment of the Superior Court (Record 839) that the expenditure of the comparatively small sum of $20,000 more on coffer-dams might have saved the contractor a loss of $143,000 or $213,000 was an entirely justifiable conclusion from the undisputable facts of rec-

ord and especially the estimates of the competing bidders (Record 549).

If the true original value of the bridge were to be taken at the actual cost to the contractor, plus his normal profit, as Appellant's witness testified (Record 635a), then every one of the bidders on that job was so incompetent that he wanted to take it at a price which would have stood him a loss of from $100,000 to $250,000 (Record 549a). Such a conclusion is impossible. Moreover, this figure is approximately $100,000 higher than even that of the present appraisers.

(2) Appellant's second objection to the use of its actual cost of the bridge is that seven other contractors submitted higher bids on the work. Such a condition is natural. Counsel remarks that all seven were keenly interested in getting the job, but it is common knowledge that the keenness with which a contractor shaves estimates to get competitive jobs depends largely on his previous fortune in keeping his equipment busy. There is no evidence of record how badly the others wanted work.

It is inconceivable that anyone contemplating the reproduction of this bridge would do anything other than was done in 1926, namely, give the work to the lowest bidder. Consequently any assumption as to what the work would cost must be based on the supposition that there would be differences of opinion among the bidders and that the lowest reliable one, not the highest nor the average, would be selected. It is not a valid criticism of original cost as evidence of

value, that it is based on the lowest of the then current opinions of the cost of the work, rather than on their average. Every conclusion of value for rate purposes based on an estimate of cost to reproduce should be reached only on the same assumption.

(3) Appellant likewise attaches some importance to the fact that an engineer of the Commission's own staff presented a reproduction cost estimate somewhat in excess of the bid accepted. This is partly due to the fact that the actual quantities are in excess of those bid upon, resulting in an increase in the cost by almost $60,000, but in principle it is governed by the answer to Appellant's contention that other bidders reached higher totals than did the successful one. In any group of estimates there will be differences of opinion and the engineers of the Commission endeavor to be neither the highest nor the lowest in their estimating work.

In none of Appellant's criticisms of the original cost of its bridge is there any reason to ascribe to it a value in 1925 in excess of its actual cost.

(d) This Court should support and enforce provisions in State statutes intended to compel the prompt advancement of all Federal questions and should refuse to review at this time the accuracy of the Commission's conclusions in 1926.

The argument of Appellant appears to assume that the binding effect of the Commission's decision in 1926 depends on the question whether or not it can properly be deemed to make res judicata the fair value of its property at that time. The question, however,

is more accurately, not one of res judicata, but one of the effect which this Court, in its determination whether or not it will review a Federal question, will give to Appellant's acquiescence in the 1926 decision in the face of the provisions of the State statute.

The section of the State statute which makes Commission decisions conclusive, if not attacked, was before this Court on a previous occasion: *New York Central R. R. Co. et al.* v. *New York and Pennsylvania Co.*, 271 U. S. 124; 70 L. ed. 865; 46 S. Ct. 447 (1926). The decision there is authority for a decision by the Court in the present case not to review the 1926 findings at this time. In Pennsylvania the determination of the reasonableness of rates which have been collected, and an award of reparation therefrom, if reasonable, are handled under the statute in two separate proceedings. The New York & Pennsylvania Company had been charged during the Federal administration of railroads, rates on intrastate coal shipments which it deemed had been excessive, and upon complaint to the Pennsylvania Commission this contention had been sustained, following the then current Interstate Commerce Commission rulings on its jurisdiction, but in view of the statute, no reparation was awarded. No appeal was taken by the railroads from this determination that their rates had been unreasonable. In the subsequent proceeding reparation was awarded and, as is provided by the statute, the rate-payer affected thereupon sued in the local court of common pleas to collect the award, the railroads defending on the basis that the decision of the Commission in the first proceeding before it had been upon

a matter beyond its jurisdiction. Both the court of common pleas and the State Supreme Court upon appeal, rejected this contention of the carriers and awarded judgment upon the Commission's award. Upon writ of certiorari to this Court, the judgment of the State Supreme Court was reversed on the ground that this Court was the tribunal which must determine whether or not the Federal right asserted by the carriers had been lost by the failure to appeal, and that the right had not been so lost, because the first order of the Commission, without requiring the payment of reparation, had done the carriers no injury and, therefore, no appeal would have lain. The relevant portion of the opinion of this Court is as follows (271 U. S. 126, 127):

> "In our opinion the failure to appeal from the former order is no bar. We do not undertake to review the decision of the Supreme Court as to state procedure, but if the Railroads were too late to argue their case before that Court, they are not too late to argue it here. *There was no order in the former hearing before the State Commission that the Railroads could have brought before us. This is the first moment when they have had a chance to raise what we regard as a perfectly clear point, as it is the first moment when their rights have been infringed.* There now is an order which is in the teeth of the statute. It would not be reasonable to hold that they are precluded from getting the protection that this Court owes them, by their having failed to go as far as they now learn that they might have gone in a previous state proceeding which did not infringe their rights and which could not be brought here. 'The judgment under review was the only final judg-

> ment * * * from which plaintiff in error could prosecute a writ of error, and until such final judgment the case could not have been brought here for review.' Chesapeake & Ohio Ry. Co. *v.* McCabe, 213 U. S. 207, 214; Smith *v.* McCullough, 270 U. S. 456. (Italics ours)."

The principle of this decision, thus forcefully stated, is in the teeth of Appellant's contention for a review of the decision of 1926 now. In the railroads' case no order had been issued which injured them so as to give them an opportunity to appeal; here the contrary is the case. The order of the Commission declared that rates then being collected were excessive and required that a tariff of rates calculated to produce a stated lesser amount be filed (Record 506a), clearly an appealable order which in fact was appealed. Appellant could then and there have carried its case to this Court, either by way of the State's appellate courts or the Federal District Court. It voluntarily decided not to do so. Its decision then precludes it doing so now.

This Court has already ruled repeatedly that if an appeal is taken to a judicial tribunal of a state and is not then carried to this Court the matter becomes res judicata:

> *Detroit & Mackinac Ry. Co.* v. *Mich. R. R. Com.*, 235 U. S. 402; 59 L. ed. 288, 35 S. Ct. 126;
> *Railroad Commission* v. *Duluth Street Ry. Co.*, 273 U. S. 625, 71 L. ed. 807, 47 S. Ct. 489;
> *Grubb* v. *Public Utilities Commission of Ohio*, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374;
> *Porter* v. *Investors Syndicate*, 286 U. S. 461, 471, 76 L. ed. 1226, 52 S. Ct. 617.

The principle behind these decisions, that the appellant is "barred and estopped" (*Grubb* v. *P. U. C.*, supra, at page 473) to re-raise his objections in the District Court is obviously that due diligence must be exercised in raising Federal questions, lest this Court refuse to permit the Constitution to be used as a means to hamper proper regulation. This principle applies also when the utility fails to take any appeal from the regulatory decision. This Court will recognize the fact that the more harsh the decision has been on the utility the more the likelihood of an appeal, yet if it were not quite unfair enough to move the State court to reverse the order the utility would be in worse position for having carried the matter that far. Thus, the more liberal the Commission were with the utility the more chance latter would have of keeping the question open for future appeals to this Court to obtain still better allowances. In order to prevent this situation the Court in determining whether or not to consider now the claim that confiscation of property was involved in 1926, should decide the question in the negative.

In its decision in *Los Angeles Gas & Elec. Corp.* v. *Railroad Commission,* 289 U. S. 287, 77 L. ed. 820, 53 S. Ct. 637, in an opinion by Mr. Chief Justice Hughes dated May 8, 1933, this Court definitely approved the use of prior legislative determinations of fair value in subsequent rate proceedings, notwithstanding the protest of the utility involved. In that case the Court will recall the Railroad Commission of California based its order on an historical cost figure and a reproduction cost estimate. The figures of historical

cost consisted of the Commission's finding of value made in 1917 together with the records of additions and betterments since that date. The opinion of this Court states (289 U. S. 308, 309):

> "* * * We agree with the court below that no ground is shown for assailing the valuation placed upon the company's property by the commission in 1917, in its first decision * * *. We find no warrant for a conclusion that there had been any change in levels during the years that intervened from the first valuation in 1917 which made it unfair to the company, in fixing rates for the future, to take the historical cost as found by the commission as evidence of the value of company's structural property at the time of the rate order."

The thirteen years which had elapsed between the dates of the two valuations made the prior valuation order of less importance compared with the additions since its date and the opinion of the Court is directed more toward the possibility of changes in price levels in the interim than to the propriety of using the prior findings if still accurate. This Court has, however, in this opinion accepted the principle that prior Commission findings of value, although not technically res judicata, may be adopted in later proceedings without a deprivation of due process.

The Court will appreciate thoroughly the fact that, as public utilities have grown as they have in the last twenty years, through merger, consolidation and otherwise, the enormity of the work involved in going through a rate proceeding to determine the reasonableness of charges based upon the value of the property

involved has become very great. Once this work has been done thoroughly and carefully in a proceeding based upon an adequate record, the authorities of the State should be able to rely upon the conclusions reached, whenever in later proceedings the value at the prior date may be used as a premise from which subsequent rate regulatory questions can proceed with comparatively little difficulty. Commissions generally, as we understand their practice, assume that in the absence of appeal their findings as to fair value of property or as to conditions in an industry may, unless evidence is received showing conditions have changed or that the Commission was so in error that injustice would be done, proceed on the basis that the prior findings and conclusions may be the premise from which to proceed further. Clearly, this has been the practice of the Interstate Commerce Commission. On pages 1797 and 1798 of the Interstate Commerce Acts Annotated, a work compiled by the Interstate Commerce Commission under the supervision of Commissioner Aitchison, there appears this statement of that Commission's attitude toward prior decisions:

> "When the commission reaches a conclusion regarding a certain rate it will adhere to that conclusion in subsequent proceedings regarding the same rate unless (a) some new facts are brought to its attention, (b) conditions are shown to have undergone a material change, or (c) it proceeded on a misconception or misapprehension.—Traffic Bureau of Nashville *v.* Louisville & N. R. Co., 43 I. C. C. 366; Banner Milling Co. v. N. Y. C. & H. R. R. Co., 14 I. C. C. 398; Receivers & Shippers Assn. v. Cincinnati, N. O. & T. P. Ry. Co., 18 I. C. C. 440; Flour City S. S. Co. v. Lehigh Valley R.

Co., 24 I. C. C. 179; Traugott Schmidt & Sons v. Michigan Central R. Co., 23 I. C. C. 684; Hires Condensed Milk Co. v. Pennsylvania R. Co., 38 I. C. C. 441; In re Rates and Charges on Grain and Grain Products, 91 I. C. C. 105; Bell & Zoller Mining Co. v. Illinois Central R. Co., 109 I. C. C. 484."

The Supreme Court of Virginia has approved this rule as followed by the commission of that state: *Dyer et al.* v. *Virginia Ry. & Power Co.*, 147 Va. 98, 136 S. E. 499 (1927). In that case the Commission, having made a valuation of the railway company's property about a year before, refused complainants' motion to have a new valuation made and allowed an increase in the rates based on the prior figures, which apparently had never been reviewed by any judicial body. On appeal by complainants the court affirmed the decision on the ground that the valuation had not "been shown to be inaccurate at the present time, nor sufficiently challenged to justify the expense and delay of revaluation, * * *"

The Supreme Court of the District of Columbia has likewise approved the use of prior valuations as a basis of rate decisions: *Washington Ry. & Electric Co.* v. *Public Utilities Commission of the District of Columbia,* P. U. R. 1930 D, 154 (1930). In that case the street railway company had applied in 1928 for an increase in rates without submitting to the Commission an up-to-date valuation of its property, one having been made for the Commission as of January 1, 1925. The Commission refused the application for the reason it had no available valuation. On appeal the

Supreme Court of the District reversed, saying, on page 156:

> "I think these valuations are intended as standards and bases upon which subsequent valuations can be made taking into consideration subsequent changes, certainly for a reasonable time unless a sufficient cause be shown for a new valuation."

Both appellate courts of Pennsylvania have approved the principle that new valuations need not be made in every rate case. This is well indicated in the cases which have arisen in the Philadelphia transit situation. In the first of these (*City of Philadelphia* v. *Public Service Commission,* 83 Pa. Superior Ct. 8) the Superior Court affirmed a Commission decision in which it was found that the value of the property was "upwards of $200,000,000," and a 6¼ cent rate allowed. The second came up without a new valuation, due to increases in operating expenses and a failure to secure the expected volume of business. The Court in affirming the Commission's action allowing the increase in rates (*City of Philadelphia* v. *Public Service Commission,* 84 Pa. Superior Ct. 135) said:

> "There is no statutory requirement that the commission shall in all cases fix a definite valuation of a utility company's property whenever there is a complaint filed against its rates. The statute gives it power to do so when deemed necessary (article V, section 20 (a)) but does not impose it as a requirement; and our Supreme Court has expressly held that it is not in all cases necessary: New Street Bridge Co. *v.* P. S. C., 271 Pa. 19. See N. & W. Ry. Co. *v.* W. Va., 236 U. S. 605; Foltz *v.* P. S. C., 73 Pa. Superior Ct. 24. As was well said by Judge Linn when the prior order was

before us on appeal (83 Pa. Superior Ct. 8): 'If in the course of its inquiry, the commission finds, as it did in this case, that it has sufficient evidence to act finally, nothing can be gained by thereafter wasting time and money in unnecessary investigation'. * * * (p. 144)

"The intervening appellant, Mr. Weisblum, who attended none of the hearings before the commission contends that it erred because, in considering this application it did not of its own motion reopen the valuation proceedings and definitely fix the value of the Company's property; on the theory that unit costs have so receded since the prior investigation as to require such action for the protection of the public. It is sufficient to say that there is no evidence in the case that prices today are so much lower than unit costs in force June 30, 1919, as to require the results of the prior investigation of values to be set aside; and there has been no such marked reduction as to put the Commission or this court upon judicial notice of it * * * *If the commission were obliged to make its own independent investigation in every one of the litigated cases that came before it, the revenues of the State would have to be swelled materially to pay for this additional cost or the delay incident to such action would render the commission of little practical use to the Commonwealth.* (p. 151, 2)"

The principle is well stated in the opinion of the Superior Court herein (Record 832, 833):

"Probably no general rule could be formulated with relation to just when it may become the duty of the commission to make a new valuation of the property of a utility. * * * it may be said that *when conditions have changed materially, or price levels have fallen or risen to a marked degree, since*

a prior investigation, the commission should again go into the question of value."

This Court needs no extended argument that as a practical matter it must be the law that when a regulatory commission has made a property valuation for rate purposes, due process does not require the abandonment of those findings and their complete recalculation unless there is persuasive evidence that there was injustice done originally or that conditions have so changed that the findings are no longer of value. In the present case there is no evidence either of error made in 1926 or of changes since then. The Court, in the exercise of its powers should consequently determine that the State authorities were justified in concluding that the valuation made in 1926 was conclusive on Appellant of the value of the property at that time.

3. The Findings of the Commission in 1926 Were, in Fact, Made Res Judicata Upon the Withdrawal in 1927 of Appellant's Appeal to The Superior Court.

The Public Service Commission expressly stated in its Brief to the Superior Court that it did not argue that the findings of 1926 had become res judicata by reason of the withdrawal of the previous appeal to that Court. This for the reason that it was and still is desired to procure a decision upon the effect generally of the provision of the statute quoted in the previous section of this Brief. It is submitted, however, as a further argument bearing upon the facts peculiar to the case at bar, that the decision of the Commission should in this specific instance be regarded as res judicata.

The decisions of this Court have demonstrated a clear principle that the Federal courts are not to be used as a means to delay and hinder State regulation. A considerable line of cases is authority for the proposition that where the appeal to the State courts is a legislative matter, the Federal courts may not interfere with the orderly procedure in the State tribunals until the matter has been carried through all of the proper State bodies. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. ed. 150, 29 S. Ct. 67; *Porter* v. *Investors' Syndicate*, 286 U. S. 461, 52 S. Ct. 617, 76 L. ed. 1226. Similarly, when the State legislative authorities have completed their work a contestant is required then to exercise his option whether to carry his appeal to this Court, through the State judicial tribunals, or through the avenue of the United States District Courts in equity. If the contestant chooses to carry the matter into the State judicial tribunals, receives an adverse decision and does not within the time specified carry his appeal to this Court, the questions which could have been brought before the State court are thereupon res judicata, precluding all subsequent consideration of them. *Detroit and Mackinac Ry. Co.* v. *Mich. R. R. Com.*, 235 U. S. 402, 59 L. ed. 288, 35 S. Ct. 126; *Railroad Commission* v. *Duluth St. Ry. Co.*, 273 U. S. 625, 71 L. ed. 807, 47 S. Ct. 489; *Grubb* v. *P. U. C. Ohio*, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374.

Turning now to the facts involving this Appellant, the situation is this: The company, being faced with a decision of the Commission, the final legislative body in the State for matters of this nature, made its decision to proceed in the judicial tribunals of the State.

Had it adhered to that decision, and had the decision of the Superior Court been adverse to it, the matter would clearly have become res judicata unless it carried its appeal to the Supreme Court of the Commonwealth and thence to this Court. It did adhere to its decision long enough to collect almost $33,000 in excess tolls from transient patrons, of which approximately $23,000, with interest thereon, has since remained in its possession (Record 432a, 433a). If a formal decision of the Superior Court on appeal would have made the matter res judicata as to this Appellant, the question involved should be determined against the Appellant no less decisively by reason of the fact that it was shrewdly enough advised, that it submitted to a voluntary non pros without awaiting the rendition of a formal opinion. Upon the principle behind the decisions of the cases cited, that appeals to State judicial tribunals not carried through to this Court render the decisions of the State courts on the Federal questions there involved res judicata, the Court might well hold that the value of Appellant's property in 1926 is now res judicata in the Federal Courts.

4. The Record Developed in 1925 and 1926 is Acceptable and Persuasive Evidence of the Value of Appellant's Property Now.

The entire argument of the Public Service Commission, up to this point, has been made upon the basis that the findings and conclusions contained in its order of June 8, 1926, are conclusive on Appellant of the value of the property at that time. Without thereby intending to withdraw in any degree from this posi-

tion, the balance of the discussion of the value of Appellant's property will assume that no findings were ever made by this Commission in 1926.

The record made in the previous case consisted chiefly of the testimony of Appellant Company's own stockholders as to their costs of organization, financing, and so on, together with that of the engineer who had designed their bridge and supervised its construction. The record was clearly a record of actual construction and not one, except in minor instances, of estimate. When the present proceeding came on for hearing, Appellant introduced an entirely new and independent reproduction cost estimate under hypothetical conditions. While the Commission also presented in evidence a somewhat similar reproduction cost estimate, it has not relied upon that evidence as a measure of value. Inasmuch as the Company's reproduction cost figures are very materially higher than those of 1925, the question which comes to the forefront of any consideration of the combined record is the credence which may be given to the statements of these appraisers.

Appellant's entire argument on the question of the value of its property is subject to a fundamental and fatal error in its assumption as to the state of the law. Throughout the entire argument it is assumed at every point that *cost* and *value* are synonymous terms, and it is assumed that *reproduction cost* and *fair value* are likewise synonymous terms in the law. Such a conclusion is without support in any of the reported decisions.

Appellant's Brief (page 20) cites a number of cases of this Court in support of a statement "that a public service company is entitled to a fair return upon the *fair present value* of its property, used and useful in the public service, although this value be greater than the *original cost.*" The Public Service Commission's decision requires no argument against the cases so cited, or the principle of law advanced. The contested question is not whether present value is the basis of rates but is as to the evidence adequate to demonstrate that value. No court has ever gone so far as to hold that a reproduction cost estimate was synonymous with value in the face of lower original cost under practically the same conditions at an earlier date, and lower reproduction costs at a still later date. None of the cases cited by Appellant purport to do this, nor do the decisions of this Court in *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 71 L. ed. 316, 47 S. Ct. 144 (1926) and *St. Louis & O'Fallon Ry. Company* v. *United States,* 279 U. S. 461, 73 L. ed. 798, 49 S. Ct. 384 (1929), commonly taken to be the decisions leaning most heavily on reproduction cost as a basis of value. Appellant's conclusion that it has shown a value of $1,029,000, as argued in the Court below, or of $970,000 as stated on page 92 of Appellant's Brief here, based solely on an estimate of cost to reproduce, is utterly fallacious.

The Commission had, and this Court now has, three important factors to consider in fixing on a fair value. One of these is the evidence of value which was the basis of the conclusion of June 8, 1926, of $767,800, being mainly figures of actual costs within two years of

that date. Another is a reproduction cost estimate as of September 1, 1929, plus certain additions, making a total of over $1,000,000. A third is evidence that construction costs had been falling from the latter date to the end of 1930, and further judicial knowledge that since the date of the order the level of such costs has fallen much farther. On these three factors a conclusion such as Appellant assumes without argument, that the fair value is equal to the peak *cost estimate* of 1929, would not be tenable even if the estimate were not inflated by claims of such extra allowances as special value of the site, attached business value, and other unusual features. The only basis of attack on the 1926 record and the claim that the real cost of the bridge was greater than the price paid the contractor, does not bear the light of careful scrutiny, as has already been pointed out in a previous part of this Brief (page 18).

The evidence of value in this whole record may be regarded from three points of view: First, the reproduction cost estimate may be deemed to show no reason for departing from the old valuation and making a new finding of reproduction cost, new and depreciated, and a new finding of fair value. This was the position taken by the Commission and is now for the moment laid aside. Second, the 1925 and 1926 figures of cost may be taken, in view of the fact that there have been no general increases in prices up to 1929, to be the best evidence of reproduction cost at this time, and the finding of value may be based on such a conclusion as to reproduction cost. Third, the reproduction cost estimates may be taken for what they are

worth as costs of their own date, but a fair value still found at the 1926 level, based on evidence of the original cost in 1925 and the 20% reduction in cost levels between the date of the appraisal and the issuance of the order.

Taking the record as a whole and disregarding the previous finding of the Commission, the testimony upon which Appellant relies does not meet the standards set up in the decisions of this Court. Appellant's witnesses presented an estimate of the cost to reproduce the property, substantially in excess of the actual cost figures contained in the previous record. While in one breath they admitted that construction costs were not higher as of the date of their estimate than they had been when the bridge was built in 1924 and 1925, they at the same time ignored the old figures and assumed that anyone who had planned to build the bridge at a lesser cost must necessarily be wrong (Record 100a, 101a). The charts of construction cost figures in the vicinity of Harrisburg, taken from the Commission's data, were presented in evidence (Record 471a, 472a). The admission of Appellant's witness as to price levels (Record 109a) has already been quoted in this Brief (page 5), and will not be stated again. The whole theory of Appellant's witnesses at hearing, and its counsel now, was that any reproduction cost estimate, no matter how great the tendency of its appraisers to magnify the difficulties, was controlling evidence of value as against any other evidence which might be presented of record. Appellant's claim of value, as stated on page 123 of its Brief to the Superior Court of the Commonwealth, was

$1,029,000, and is now $970,000 (Brief, page 92). Of the larger sum, which is that which Appellant's witnesses sought to justify as the fair value of the property (Record 63a, 65a), the estimate of these appraisers sets up a reproduction cost of the physical property of only $718,000 (Record 510a), leaving a difference of about $311,000 for various intangible costs. While counsel for Appellant appears to have disagreed with our statement as made in the Brief to the Superior Court, that these intangibles amount to 45% of the physical items, we feel constrained to repeat it here. Counsel has apparently assumed that such things as attached business value and the right to maintain a toll bridge at this point are not properly considered intangible property.

In the quite recent decision of this Court in *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U. S. 287, 77 L. ed. 820, 53 S. Ct. 637, Mr. Chief Justice Hughes, speaking for this Court, make several statements which directly refute Appellant's present argument that the original cost of the property cannot be accepted as its present fair value. It is there stated (289 U. S. 287, pages 306-9):

> "* * * No one would question that the reasonable cost of an efficient public utility system 'is good evidence of its value at the time of construction.' We have said that 'such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices.' McCardle *v.* Indianapolis Water Co., 272 U. S. 400, 411, 47 S. Ct. 144, 148, 71 L. ed. 316. And, when such a change in the

price level has occurred, *actual experience in the construction and development of the property, especially experience in a recent period, may be an important check upon extravagant estimates.* * * * In Southwestern Bell Telephone Co. *v.* Public Service Commission, [262 U. S. 276, 287, 288, 43 S. Ct. 544, 546, 67 L. Ed. 981] this Court said "* * * An honest and intelligent forecast of probable future values, made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded, such a forecast becomes impossible." See St. Louis & O'Fallon Railway Co. *v.* United States, 279 U. S. 461, 485, 49 S. Ct. 384, 73 L. ed. 798. But, again, *the court has not decided that the cost of reproduction furnishes an exclusive test.* * * * *We have emphasized the danger in resting conclusions upon estimates of a conjectural character.* * * * The weight to be given to actual cost, to historical cost, and to cost of reproduction new, is to be determined in the light of the facts of the particular case. * * * In determining the weight to be ascribed in the instant case to historical cost as shown by the evidence, the outstanding fact is that the development of the property had, for the most part, taken place in a recent period. We agree with the court below that no ground is shown for assailing the valuation placed upon the company's property by the commission in 1917, in its first decision. * * * *There can be no question that the cost of additions and betterments from 1926*—in the period just preceding the commission's order under review—*was good evidence of their value at that time.* And, so far as prices of labor and materials are concerned, we find no warrant for a conclusion that there had been any change in levels during the years that intervened from the first valuation in 1917 which made it

unfair to the company, in fixing rates for the future, to take the historical cost as found by the commission as evidence of the value of the company's structural property at the time of the rate order. [January 1, 1931.] On the contrary, it clearly appears that, by reason of the downward trend, the prices for labor and materials, which were reflected in that historical cost, were higher than those which obtained during the later period to which the prescribed rates apply. (Italics ours.)"

Appellant's whole argument has been an attempt to discredit and evade the record of its actual experience in 1924 and 1925 in favor of the estimates of its professional appraisers made in 1929. In the light of this Court's pronouncements in the *Los Angeles Gas and Electric* case, Appellant has assumed a heavy task. As the Commission said in its report (Record 19a, 20a, 29a):

"A significant factor in the present consideration is that all the new material submitted in this proceeding is a matter of judgment and estimate on the part of appraisal engineers, whereas the finding in 1926 was made almost in its entirety upon actual cost figures as shown by the books of the company and sustained by the testimony of the engineer in charge of the bridge construction. In the absence of evidence that these figures were either abnormal at that time or have become obsolete by reason of changes in price levels or construction conditions, they should carry a very material weight in forming a decision as to the reproduction cost and value of this property at the present time. * * *".

The valuation of the property in 1926 was made chiefly on actual cost figures adequately supported by testimony of engineers. The present claim of increased value is based on non-competitive estimates of appraisers whose business it is to make such estimates. "Actual experience in the construction and development of the property * * * may be an important check upon extravagant estimate" as this Court pertinently says in *Los Angeles Gas & Elec. Corp.* supra., page 306.

In the face of the evidence of record as to the actual cost of the bridge in 1925, and the fact that the general level of prices had fallen rather than increased between that time and the date of the Commission's order and the present time, together with the general lack of accuracy and credibility of Appellant's reproduction cost figures, Appellant's reproduction cost estimates are not worthy of acceptance as a measure of the present fair value of its property.

5. Appellant's Claims for Specific Additional Allowances of Property Value are Unsound.

The appraisals made by Appellant's engineers are typical self-serving works by professional witnesses. In the matter of depreciation in particular the Superior Court was led to remark of the evidence of Appellant's chief appraiser: "We were not impressed by his testimony." (Record 844). It was also brought out in cross-examination after the appraisers had set forth the extent of their examination of the structure, that measurements of quantities had been taken from the final estimate made up when the bridge was paid

for, even to the extent of adopting errors occurring through the transportation of figures in copying quantities at previous dates (Record 90a, 91a). Similarly, as to cost of certain items adopted from the books, several items were omitted, including credits from salvage involved in removing the old bridge (Record 92a, 93a, 441a). Even in the more substantial items such as reinforcing bars, the engineer did not look into the problem carefully enough to ascertain that mills were available in the immediate vicinity at which the bars could be procured. Instead they calculated on a haul over the Alleghenies from Pittsburgh. The cost of this haul counsel has agreed should be omitted (Brief 31) but its inclusion tends to indicate the general lack of thoroughness of the appraisal. The senior engineer was only on the site a part of one day and his estimate of depreciation which he calls "the defects which could be observed," only amounts to be about two per cent of the depreciable property when the bridge itself was more than four years old and some of the retaining walls are probably more than fifty years old. This gentleman did not recall having seen a substantial crack in the north abutment of sufficient size to expose the reinforcing steel. These witnesses' testimony indicated that their allowances for the intangibles were based on general experience and not on any special study of the conditions applying to this company in particular. All in all, it does not indicate those qualities which would give it that compeling weight necessary to overthrow the company's actual cost experience in recent years.

(a) *Old Fills*

As has been noted, the new bridge of 1924 and 1925 was built immediately down stream of the old bridge (Record 513a). The piers of the old bridge were removed from the river, but the abutments and wing walls and the earth highway approaches to the old bridge were not removed (Record 97a, 98a). Appellant claims that, being on the upstream side of the bridge, they constitute something of a safeguard against ice and high water. They are therefore included as new structures in Appellant's cost estimates at unit costs which the witness admitted were unusual (Record 100a), but still necessary in his opinion. The difficulty with Appellant's contention is not that the Commission thought that earth fills deteriorate, which Appellant denies, but that it considered that regardless of their *cost* they never had a usefulness or *value* to this bridge greater than the $12,000 allowance made for them in 1925 by Appellant's own engineer (Record 441a, 784a). They are left over material which, if it had not already been there, might never have been used at all: Appellant has never asked any one of its witnesses if he as an engineer would have built these walls and fills merely as ice and water barriers.

(b) Indirect Construction Costs and Intangibles.

A review of these witnesses' evidence on intangible items generally (Record 58a-62a, 122a-125a, 521a-524a) will indicate that their allowances for these items were based on their general experience rather than specific information on conditions affecting Appellant (Record 123a). Their figures (Record 510a)

are substantially greater than those submitted in 1925 on Appellant's actual experience (Record 440a, 441a). Their claims are further illustrations of the same sort of conjectural matter which this Court rejected in *Wabash Valley Electric Co.* v. *Young,* 287 U. S. 488, 500, 77 L. ed. 348, 53 S. Ct. 234 (1933), and *Los Angeles Gas & Electric Corp.* v. *Railroad Comm.,* 289 U. S. 287, 310, 77 L. ed. 820, 53 S. Ct. 637 (1933).

The history of Clark's Ferry as a river crossing point is of material interest in this connection. When the members of the corporation now operating the bridge acquired the old property about 1915 they were not embarking on any new enterprise. As conceded in Appellant's Brief (page 94) the first bridge at that location was put there almost a century before by the State itself. The development of this point as a river crossing, the development of the habit of travel in that direction, and the construction of the highways to it, all being the pioneer work of making the bridge a success, had all been done by the State before these people took it over as a developed enterprise. The appraisers, however, concede that their estimates for the cost of promoting the company and financing its construction are made on the assumption that there had never been a bridge at that point (Record 122a, 123a). The witnesses' assumptions are based on conditions not found in the case.

(c) Cost of Financing

The financial history of Appellant is set forth in the report of the Commission's accountant (Record 426a-432a) and in the prior opinion of the Commission

(Record 493a, 494a). The facts are not denied. The significant thing about it is that in 1924 Appellant was building a bridge at a contract price of $501,000, and had about $50,000 worth of land and material left over from its old bridge. Against this total sum of roughly $550,000 it was endeavoring to float a bond issue of $450,000 in 6% bonds. Naturally the bankers who floated such an issue insisted on a substantial fee for their services in finding buyers for it. Of the total sales cost on these bonds of $58,500 (Record 441a), $31,500 went to the bankers for their fees (Record 431a) and $27,000 was allowed the buyers as a discount on the bonds, because the interest rate was only 6%, which apparently was not sufficient to induce bond buyers to enter upon such a venture. In view of this history the Commission allowed the Company a total of $37,500 in the former case for brokerage or cost of financing (Record 499a) and the same amount remains unchanged now.

In order to support its claim for a figure equal to its costs both for brokerage and discount on the bonds, Appellant has produced testimony as to the difficulties of selling toll bridge securities in Philadelphia, Detroit and near New Orleans. As to the latter two there is no evidence the conditions are in any way comparable. As to the Tacony-Palmyra Bridge over the Delaware River in Philadelphia, it is within this Court's knowledge on an appeal from a state court of Pennsylvania that there is also a publicly owned bridge over the Delaware competing with that bridge and expected ultimately to become a free bridge when its cost has been amortized. Obviously, the difficulties

there are not those of a bridge far from any other bridge, and at a spot known as a crossing point for a hundred years, to which the State has built its main highways. As a matter of fact a glance at the financial columns of the newspapers will indicate even the stock of the Tacony-Palmyra bridge sells at prices materially above those which would give a rate of return such as Appellant's witnesses require.

(d) *Special Value of the Bridge Site*

Appellant's claim for an allowance of $100,000 additional value to its property because of the location of its bridge was made by it in the former case before the Commission and was rejected. Its present appraisers have also acquiesced in the claim. This contention is based on the theory that its bridge is located at a point where the river is narrower than usual and the bed-rock is closer to the surface. It seems to counsel that this contention of Appellant fails to recognize the fundamental principle of public utility regulation, which is to prevent a fortunately situated utility from taking advantage of its location and the public necessity for its service in order to compel the public to pay the price which it chooses to demand. Among the earliest cases in the history of utility law will be found those in which the owner of the one and only site for a grist mill endeavored to pick and choose his patrons or to mill the grain only at extortionate prices. The same sort of situation is the basis of the leading cases of *Munn* v. *Illinois,* 94 U. S. 113, 24 L. ed. 77 (1877), and *Budd* v. *New York,* 143 U. S. 517, 36 L. ed. 247 (1892), which in turn go back to *Allnutt*

v. *Inglis*, 12 East. 527, and that in turn to the writings of Lord Hale in the seventeenth century. This is not the situation where foresighted individuals have brought together a number of separate units of property and by their grouping have developed a consolidated value not previously existing.

The decision of this Court in the *Minnesota Rate Cases* (Simpson v. Shepard), 230 U. S. 352, 451-456, 57 L. ed. 1511, conclusively determines that all possible uses of land are to be considered in determining its market value and that fair market value is the basis on which it shall be considered for rate purposes; special uses over and above the extent to which they affect market value are not considered. The decision of this Court in the case cited is still the law. Appellant has been allowed all its asked for the market value of its land. Special usefulness to Appellant over and above market price is immaterial.

Appellant's claim likewise forgets that its right to operate a toll bridge at this point is the gift of the Commonwealth, contained in Appellant's franchise, and to attach a value to it would be to capitalize the franchise, contrary to the provisions of the Statute (Article III, Section 6 (a) (Purdon Penna. Stat., Sec. 241) and the frequent decisions of the courts. Moreover, as has been stated, Appellant's incorporators did not exercise any foresight other than that which could be expected of any prudent man when they chose this location for the building of their new bridge. The prior history of the site would have made the choice of any other location an obviously foolish move. Cer-

tainly had such a choice caused the expenditure of an additional $150,000 to $200,000 as Appellant's appraisers suggest it would, the additional money and possibly almost the entire investment at that location would have been regarded as an imprudent investment upon which the company would have no legal right to expect the public to produce a fair return. Appellant has merely done the thing which was most obvious and has taken advantage of traffic customs which had already been established for it. It should not be allowed to capitalize them in order to demand an increased rate from the traveling public. By the evidence of its own witnesses Appellant's real estate does not have a market value of the $100,000 or more which it claims. Consequently the remarks in Brief relative to the necessity of paying such a value in condemnation proceedings are without merit.

II.

THE ALLOWANCES MADE BY THE STATE TO MAKE UP APPELLANT'S GROSS REVENUE ARE ADEQUATE TO ELIMINATE ANY POSSIBILITY OF CONFISCATION

A number of items were involved before the Commission and before the Superior Court under this heading. Appellant, however, has acquiesced in the conclusions on all of them except the allowance for annual depreciation and the rate at which the fair return is to be calculated. Of course, these two are by far the most important to Appellant in consideration of the amount of dollars involved.

1. The Allowance for Annual Depreciation is Adequate

Appellant's Brief, in the matter of annual depreciation, contains an interesting discussion of the subject, yet we feel that it falls far short of sustaining the conclusion reached. In dealing with this point the Brief of the Commission will treat together the depreciation which has already occurred, and the allowance which should be made annually for that which will occur in the future.

Appellant's case on the subject of depreciation was presented by two sets of engineers working independently. The accrued depreciation was covered in the appraisal made for Appellant by the American Appraisal Company of Milwaukee, through its engineering witnesses, Messrs. White and Johnson. The annual

allowance for depreciation was covered by Mr. Nathan Jacobs of Pittsburgh, and Mr. Frank M. Masters of Harrisburg, the man who designed the bridge and was in charge of its construction. The views of these two groups of men are entirely inconsistent.

The appraisal of the bridge was made as of September 1, 1929, when the bridge, completed May 30, 1925, was four and one-third years old (Respondent's Exhibit No. 1—Record 507a-539a). The depreciation which the witness White "observed," at this time, amounted to $16,282. The engineer of the Public Service Commission, who examined the property and made his estimate of depreciation as of May 30, 1931, at which time the property was six years old, arrived at an accrued depreciation of $41,403 (Record 237a-239a).

Appellant's argument on annual depreciation, particularly the last two paragraphs of it, amounts to an admission that the straight-line method, by which it determines the amount of its depreciation allowance, results in giving it an excess to which it is not entitled. It answers this only by saying that in attempting to prevent Appellant from getting the excess, the Commission has taken from it too much. Even on the hypothetical facts which the Brief sets up to illustrate this point, the conclusion reached is not sustained entirely; no part of it is sustained on the actual facts of this case.

The testimony of record indicated a considerable lack of understanding of the nature of depreciation, and of that which is necessary for consistency in it.

The attitude of the Company's appraisal engineer, handling accrued depreciation, is that deductions can and should only be made for that which is visible to the naked eye, which he calls "observed deterioration" (Record 511a, 522a). Appellant's other witnesses, supporting the accounting allowances for annual depreciation, talked at length of the invisible chemical change which occurs in concrete from the moment of its pouring, and of the necessity that reserves be set aside to take care of the future day, years hence, when the invisible, but none the less actual, deterioration of the bridge will be visible and more rapid.

One of Appellant's latter witnesses epitomized this whole attitude when, under cross-examination, he disclaimed any necessity of consistency between his testimony and that of Appellant's other witnesses, by saying (Record 146a): "I think accrued depreciation is a matter to be determined by inspection and examinations; annual depreciation is a matter of accounting." To this sort of reasoning we take exception. Depreciation, whether past or future, is a real thing and not merely a matter of bookkeeping. It must be determined by a careful study of the property and that does not mean merely walking around on it and observing as much or as little as the appraiser's inclination requires. It involves not only an examination of the structure but also a study of all that can be ascertained as to its history, the methods by and conditions under which it was built, and a further study of all the experience of experts on other similar structures which may shed light on what may be the condition of the structure in question. The determination of

what depreciation is likely to occur in the future is not a matter of accounting. It is something to be determined after careful study by a competent engineer. The determination of what amount shall be put annually into the reserve for depreciation is a matter of policy or accounting, but it must be based on facts actually determined as to the probable actual depreciation. The testimony of Appellant's witness, Mr. Masters, who designed and was in charge of the construction of the bridge, establishes beyond the possibility of a doubt that concrete bridges deteriorate from the moment of their completion and that from that moment there are chemical changes in their structure, absorptions of moisture and oxidation, both within the concrete and in the re-enforcing iron covered by it, which can never be stopped in their process or their effects removed afterwards (Record 158a-160a). One could not wish more thorough-going testimony to repudiate the estimate of accrued depreciation offered by Appellant's western appraisal engineers, based solely on a visual examination. This witness stated frankly that in his opinion a reserve in the amount of $21,210 per year should have been commenced as soon as the bridge was built, which is thoroughly consistent with his claims for the future. Had it been done, the company at the end of four and one-fourth years, when the appraisal was made, would have had a reserve of approximately $90,000 as compared with the $16,282, estimate of what had actually been incurred. Appellant contends that this would be perfectly proper and we do not now suggest that a reserve for depreciation should never be greater at any given time than the depreciation which has actually been incurred up to that

moment. Nevertheless, the amount to be put in the reserve should be based on an understanding of what has occurred and is likely to occur, and should bear some relation to it.

Let us consider the purpose for which a reserve to meet depreciation is created and is properly to be allowed as an operating expense. When money is invested in a utility project the investor is entitled to insist that not only the expenses of operation be paid and a return derived, but also that the investment will be preserved from impairment due to its use and age. The reserve for depreciation is consequently the source of the funds which from time to time during the life of the business will replace the major units of property which have been worn out or become obsolete and must be abandoned and replaced by other property. Applying this principle to a structure of the type here in question, in which the entire investment is in one unit of property which as long as it is used is useful to almost its fullest extent, but which ultimately will become unsafe or obsolete and inadequate, the reserve for depreciation is the thing which at the end of the useful life of the bridge will make it possible for the corporation, without requiring new subscriptions from its stockholders, to replace the structure with another of equal value. What we are trying to do then is to provide Appellant with the money with which to replace its bridge 35 or 40 years hence. Appellant's right is thus to insist on a reserve which will replace its property when its economic life is ended and to have the accumulation of the fund begun soon enough to offset step by step the decrease in property value from

depreciation accrued and to assure it of the fact that it will be there when needed. It does not concede that its structure has depreciated to the extent of $150,000 already (7 × $21,210) or that by 1940 it will have depreciated to a total of $320,000 (15 × $21,210) and the Commission's order assumes that there has been no decrease in value for rate-making purposes. Appellant consequently has no right to demand a reserve for depreciation which would give it a reserve at the present time of $150,000, which it could invest at interest or distribute to its stockholders as it saw fit. It does have the right to demand that the traveling public build it a reserve which will replace its bridge when worn out, but it does not have the right to demand that that fund be turned over to it long before the bridge is worn out and then dissipated or invested so as to double itself in amount for Appellant's benefit before it is actually needed.

The enormity of the Company's demand becomes more apparent when the figures are studied. The Commission placed a value on the bridge of $767,800, and the Commission's engineer assumed a useful life of 45 years. If a sum of money is turned over to Appellant each year in an amount sufficient with interest at 4% to produce this sum at the end of that period, the amount necessary to do this is only $6,242 a year. On this basis $10,000 a year would build up approximately the value which the company claims. The reserve allowance of $21,200 per year, which the company claims, would, if compounded at the same rate, multiply itself in the forty years which the company uses the bridge, approximately 95 times and would in

that time have built up for Appellant a reserve for a new bridge of $2,015,501.45, which is approximately twice the value which even Appellant claims for its present structure.

Appellant's contention that it is entitled to a reserve for depreciation on a straight line basis without any assumption with regard to interest, is based on the theory that it has the right to take this money as its own. Such a theory presupposes that the property has actually deteriorated to an extent equal to the reserve set up each year and that this allowance is necessary to the company in order to preserve the equity of its stockholders because of the deterioration of the property.

Such a theory is sound, as Appellant now appears to concede in its Brief (page 83), only to the extent that depreciation has actually occurred in Appellant's property. If the Company's contention in regard to depreciation were to be accepted, the Court would have said, as a matter of principle, that the Company, having built in 1925 a bridge said to have been worth $1,045,000, could in 1932 hold the same bridge deteriorated by then to be worth only $1,029,000 and earn on the latter sum a return of 7%, and could also have a cash fund of $150,000, or else have distributed the fund among its stockholders over and above the 7% return and actually have only $895,000 in the bridge, although getting a return on $1,029,000, the public having repaid to the company the $134,000 of its investment not involved in the depreciation. We submit to the Court that such a result is wholly unreasonable and to refuse to allow it is not confiscation.

As to the allowance which the Commission did make to this Appellant, it must be borne in mind constantly that no deduction was made for accrued depreciation occurring since the value of the bridge was first determined in 1925. Appellant's Brief states (page 79) that the report of the Commission declares that accrued depreciation must be deducted from reproduction cost in arriving at a rate base, thus depriving the Company of its earnings upon the amount which has been destroyed by deterioration, while at the same time it would confiscate the interest on depreciation reserve which offsets this loss. In view of the fact to which we have called attention, this statement of the Commission's position is not correct. It is likewise stated in Appellant's Brief (page 80) that it is the view of the Commission that the amount of accrued depreciation should be measured by the amount set up as a reserve against accruing depreciation. This again is not a correct statement of the Commission's position. It did not and does not now contend that the amount of accrued depreciation need ever be determined by the accounting reserve for future depreciation. Both must be determined, having the other in mind, and both are to be determined upon a knowledge of the same factors, but neither is the measure of the other.

This Court has said repeatedly that allowances for depreciation are matters of fact to be determined as matters of good judgment and not reversed by this Court unless clearly erroneous: *Georgia Ry. Company* v. *Railroad Commission,* 262 U. S. 625, 67 L. ed. 1144, 43 S. Ct. 680; *Los Angeles Gas & Elec. Corp.* v. *Rail-*

road Comm., 289 U. S. 287, 320, 321; 77 L. ed. 820; 53 S. Ct. 637,649. The Court has approved the examination of accrued depreciation and allowances for annual depreciation together: *Los Angeles Gas & Elec. Corp.* v. *Railroad Commission, supra.* It has likewise decided that as the property depreciates the company is entitled to make "provision out of earnings for its replacement." *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 13, 53 L. ed. 371, 380, 29 S. Ct. 148. This statement of principle has been repeated many times. That the fair return is allowed on full value without deduction for accrued depreciation may also be considered as a factor reducing the depreciation allowance: *Los Angeles Gas & Elec. Corp.* v. *Railroad Commission, supra.*

The amount allowed annually for depreciation is $7,678, which is actually 1% of the value fixed. This was the amount allowed in the earlier case as a compromise of various opinions within the Commission, and the allowance was repeated in the present case. No attempt has ever been made to justify the exact amount on the ground that it is 1% of the fair value. Due to the unusual type of business in which Appellant is engaged, it has no practical opportunity to reinvest its reserve for depreciation in the service of the public; it has no use for the money until the time comes to substitute a new bridge for the old one. There is, therefore, no necessity that it be given a reserve for depreciation other than that which, with interest, will provide it with the necessary funds to replace its structure when the time comes to do so. Compounded at 4%, the amount of $6,242 annually (equal

in amount each year and not increasing) will do this, so that the amount allowed is actually about $1,400 larger than it need be. As the Superior Court commented in its opinion, the sum allowed is sufficient, with simple interest, to replace the bridge in the period of fifty years (Record 845). Appellant's appraisal engineers admit an actual depreciation of only $16,282 in four and a third years, but their colleagues insist on a reserve for the same period of $91,910. Avoidance of confiscation does not require the Commission "to make an annual allowance which in the light of experience would be excessive:" *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133,158, 75 L. ed. 255, 51 S Ct. 65, 72; *Los Angeles Gas & Elec. Corp.* v. *Railroad Comm.*, supra, 320, 321. The Commission, moreover, is allowing the Company to earn its full seven percent. return on the depreciation which has already occurred. In view of these facts, the allowance of $7,678 is entirely adequate and even generous.

2. The Rate of Fair Return is Sufficient

Appellant's contention that it should be allowed a fair return of at least 9% a year or even 10% is based upon conditions which do not apply to it. It purports to base its claim for this rate of return on the physical hazard of a business dependent upon the existence of a bridge over the Susquehanna River which is unquestionably affected by flood and ice conditions and also on the economic hazard of toll bridges. The Commission's allowance for fair return is 7% upon the value of the property, in addition to the Federal Income Tax payments and the annual cost of insurance. The making of allowances for Income Tax and the

insurance tends to lower the rate of return necessary, as this Court ruled in *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 399, 66 L. ed. 678, 42 S. Ct. 351, and the Court of Pennsylvania adopted in *York* v. *Public Service Commission,* 85 Pa. Superior Ct. 139 (1925).

By far the largest item in the allowance for insurance is that for the flood, use and occupancy insurance which Appellant carries. The only evidence of the nature of this insurance is that of the Commission's accountant, who described the insurance as "flood, lightning, use and occupancy" (Record 436a, 437a). Counsel for Appellant made no effort on cross examination of this witness or in rebuttal to show that this insurance does not protect the Company from loss of use of the bridge. Consequently, the argument in Brief that there is no evidence indicating that Appellant's property is adequately protected by this insurance is without merit.

This particular insurance costs the company about $1300 a year as compared to the $30,000 per year additional return (2% additional return on $750,000) which Appellant asks and bases in part on this danger. In view of the fact that the danger of loss of the bridge through flood and ice is so adequately as well as so cheaply taken care of by the insurance there is no reason why this should be regarded as a factor tending to justify an increased fair return to this particular company.

As to the economic hazard, Appellant's evidence of

expense of attracting money to such a type of company is based upon experience under radically different conditions. It is true that it itself found it expensive to finance the building of its new structure, but that is not surprising in view of the fact that it was floating a bond issue of $450,000 of 6% bonds when the estimated cost of its new bridge was only $501,000, to which may be added approximately $50,000 for the value of parts of the old bridge which were useful in the new. The corroborating evidence which Appellant offers bearing on the difficulty of attracting money to the construction of a new bridge in Philadelphia competing with an existing one publicly owned, or of new bridges in Louisiana and Michigan, deals in both cases with conditions so radically different from that which we would have here that they are of no weight whatever. In point of fact, one has but to pick up the financial columns of the daily papers to see that even on the Tacony-Palmyra Bridge the dividend rate on the market price of the stock is not materially different from that of other utility stocks.

Appellant's argument that its business is subject to greater competitive hazard than is that of other utilities is clearly unsound. The assumption that telephone, electric, gas and water utilities operate without hazard is in the teeth of the experience of the last few years. As has already been noted in this Brief, this Appellant's experience during the year 1930 and 1931 has shown not the slightest ill effect of the depression (Record 452a, 483a, 484a, 810-819). The forecasts of its traffic engineer have in no degree come to pass.

This Court has in a number of cases, some of which are cited by Appellant, made statements of general principle as to the basis of the determination of a rate of fair return. Upon these both parties to this proceeding are in accord. It is to be noted, however, that the Court likewise said in *United Railways* v. *West*, 280 U. S. 234, 249, 74 L. ed. 390, 50 S. Ct. 123:

> "What is a fair return * * * cannot be settled by invoking decisions of this court made years ago based on conditions radically different from those which prevail today. The problem is one to be tested primarily by present day conditions. Annual returns upon capital and enterprise, like wages of employes, cost of maintenance and related expenses, have materially increased the country over. This is common knowledge. A rate of return upon capital invested in street railway lines and other public utilities which might have been proper a few years ago no longer furnishes a safe criterion either for the present or for the future."

Lincoln Gas Co. v. *Lincoln*, 250 U. S. 256, 258, 63 L. ed. 968, 39 S. Ct. 454 (1919), is cited by the Court in this connection. The Court will recall also that the statement is made in the opinion in *United Railways Co.* v. *West*, *supra*, 252:

> "In the light of recent decisions of this Court and other Federal decisions, it is not certain that rates securing a return of 7 1/2% or even eight percent. on the value of the property would not be necessary to avoid confiscation."

A considerable number of decisions were cited in support of this statement. In that decision the Court was speaking of conditions existing up to 1930,

for in *Wabash Valley Electric Co.* v. *Young,* 287 U. S. 488, 502, 77 L. ed. 348, 53 S. Ct. 234, and again in *Los Angeles Gas & Elec. Corp.* v. *Railroad Commission,* 289, U. S. 287, 319, 320, 77, L. ed. 820, 53 S. Ct. 637, 649, the Court held that a return of 7%, in the one case for an electric company and in the other for a gas company, were non-confiscatory returns. The District Court for the northern district of Illinois has clearly construed these decisions as requiring reduced rates of return at the present moment, as witness its allowance of only 5 1/2% for 1932 in the Illinois Bell Telephone case: *Illinois Bell Tel. Co.* v. *Gilbert,* 3 F. Supp. 595. See also *Kanakee Water Co.* v. *Gilbert,* decided by the same court January 6, 1933.

It is well known today that the rates of return and the profits which were available in the last few years are not be to expected at the present time. The decisions of the Court, based on economic and financial conditions of from three to five years ago, must be re-read in the light of conditions existing now, and from which any upward change will be gradual. The order of the Commission spoke only for the future and did not purport to decide what should have been done prior to the date of its issuance, February 2, 1932: *Centre County Lime Co.* v. *Public Service Commission,* 96 Pa. Superior Ct. 590 (1929). It consequently did not purport to cover the "prosperity" period. The allowance of a 7% fair return in addition to Federal Income Tax, and in addition to insurance, is a fair and adequate and non-confiscatory return at the present time, and it is not necessary to argue what might have been necessary for Appellant during prior years.

III.

THE FORM OF THE ORDER INVOLVES NO CONFISCATION

The Commission's order (Record 34a) requires Appellant merely to file and publish a tariff designed to produce a gross revenue of not more than $84,125. As modified by the Superior Court, the form of the order remains the same but the amount is increased to $85,455. (Record 847). Appellant contends that this form of order is necessarily confiscatory because the burden is left on it of devising rates which will produce only the reasonable revenue specified; since, it reasons, no year may ever produce more than the minimum non-confiscatory return and the years' business will necessarily vary, the average must always be less than the specified amount and property is confiscated (Brief page 91).

This reasoning requires a construction of the order whereby it would require that at no time or at least for no whole year could the revenues ever exceed the annual rate specified. If it were to be so construed the rates would have to fluctuate almost from day to day so as to keep the revenue accurately to this amount. Otherwise the maximum would have to be designed to allow for an average over a period of time, less than the maximum but above the point of confiscation.

A more reasonable construction of the order is that it requires that the rates over a period of time, reasonable in extent, shall not exceed the specified maximum.

The Court will note that the order does not specify any period of time while shall be the test to ascertain if the tariff is in truth designed to produce the designated annual gross revenue. Appellant merely assumes it is one year. In point of fact it need not be.

This construction of the order is minimized by Appellant as a suggestion that perhaps the administrative officials of the State may be negligent in their duties. The matter, however, is not one of administration but is one of law. The form of order is that in regular use and the Superior Court has already approved this construction of it; *City of Erie* v. *Public Service Commission,* 103 Pa. Superior Ct. 59 (1931). In a prior decision the fair value and maximum allowable gross revenue of the company involved in that case had been determined by the Commission and the Superior Court: *City of Erie* v. *Public Service Commission,* 96 Pa. Superior Ct. 42 (1929). Shortly after this decision the City of Erie filed a second complaint pointing out that the revenues of the company were running substantially higher than had been expected by the witnesses who appeared before the Commission in the first case, and a reduction in the rate was sought to reduce the total return on the value previously determined to that which the Commission had allowed. By the time the second case was decided three years experience was available. The Commission determined, however, that under the conditions then existent in that locality, the losses of the first year and the gains of the second and third years should be considered together and that on three years trial it could not be determined whether or not the rates would

continue to run in excess of the prior estimates of the engineers. The Commission consequently determined that further time was necessary before any change could properly be made in the rates previously fixed. The Superior Court affirmed this decision of the Commission. Its opinion clearly indicates that as long as the rates which Appellant might put in effect in compliance with the order of the Commission, produce a revenue which in any degree approximates that fixed by the Commission, there will be no interference with them until enough time has elapsed to determine what the seasonal and annual changes in business will produce as an average revenue. Clearly, this period might be considerably longer than one year.

Appellant's reference to the present proceedings in the Court of Common Pleas of Dauphin County, Pennsylvania, for the collection of penalties or forfeitures, has no bearing on the present controversy or on the construction to be placed on the Commission's order in it. A casual glance at the gross revenues which Appellant has obtained since the previous order of the Commission in 1926 (see page 4 herein) will clearly indicate that it has never made any attempt to comply with that order. Its revenues for a period of six years have run better than 50% in excess of the amount specified. Presumably the action in the common pleas is based on this apparently willful disregard of the Commission's order. This situation, however, could in no way indicate that if an attempt were made in good faith to comply with the order of the Commission, the tariff of specific rates, would have to be designed never to exceed the maximum fixed.

The regulatory statute requires in Article II, Section 1(b) (66 Purdon Penna. Stat., Sec. 22), that a utility charge only reasonable rates. The order of the Commission merely requires that this Appellant conform to this mandate and file rates that over reasonable periods do not exceed the maximum specified. In so doing, no confiscation is involved.

IV.

ALLOWANCES MADE ABOVE THOSE NECESSARY TO ESCAPE CONFISCATION

There are one or two respects in which allowances have been made this Appellant which need not have been granted in order to avoid confiscation of its property. This Court in passing on the question of confiscation may properly give consideration to the fact that these further allowances have been made: *United Railways Co.* v. *West,* 280 U. S. 234, 253, 74 L. ed. 390, 50 S. Ct. 123.

In the original valuation of this property there was included an allowance of $21,950 as the estimated cost of removing the old bridge, less its salvage value, (Record 494a, 495a). It was then believed that it would be necessary to remove the old bridge not only to a point below low water level but also to remove the pier foundations in the bed of the stream. The latter work, however, has never been done, and the company's testimony now is that it has spent only $4,786 on this work (Record 175a) less $1,000 in salvage. There is no prospect of the work being done in the near future. Consequently, the excess allowance of approximately $18,000 may be considered by this Court as a credit against Appellant's claims, in the Court's consideration of the Commission's ultimate conclusion of fair value.

As has already been noted in the discussion above of the allowance for annual depreciation, the sum of $7,678 allowed is actually about $1,400 per year greater

than that necessary, at 4% interest compounded, to replace the bridge at the end of its useful life. This excess amount may likewise be considered by the Court as a credit in Appellant's favor.

The modification which the Superior Court made in the Commission's conclusion was to increase the allowable gross revenue by counting as an annual operating expense, the sum of $1,331, being the amount charged off each year to amortize the discount allowed to the buyers of Appellant's bonds. This fact has already been noted in the discussion of the allowance for cost of financing. Since this discount is an interest charge, directly resulting from the fact that the interest paid annually was insufficient to satisfy bondholders, it should be treated exactly like bond interest, that is, paid by Appellant out of its fair return and not by the rate-payers as an operating expense. In this discussion of discount on bonds we are not referring in any way to the charge made by the broker for handling the issue.

In Blanning on "Public Utility Regulation in Pennsylvania," the distinction between brokerage charges and bond discount is well set forth on pages 49 and 50 (Section 57) as follows:

> "Brokerage has been defined as 'the expense necessary to be paid a reputable broker for making a full and complete investigation into the cost and prospects of an inviting public service enterprise and a reasonable compensation for inducing his clientage to invest in well secured bonds and securities of such corporations.'

"In addition to paying brokerage, a corporation will sometimes authorize the broker to sell the bonds at a price less than their par value. The amount of discount which a corporation must make in order to find a market for their bonds depends on the rate of interest which they bear. The discount is really deferred interest. Since interest on bonds is not an operating expense, but is paid out of the 'fair return' which the Commission must allow, it would seem that bond discount should be treated in the same way."

When bonds are sold to the public through brokers there are frequently two factors which require the company to accept less than the par of the bonds. One of these is the fee which it pays to brokers for handling its securities; the other is the discount or premium which must be given to or may be obtained from the public. Thus if bonds are sold to the brokers at 87 and then in turn sold by the brokers to the public at 94 the net difference to the company will have been thirteen points. The seven points between 87 and 94 are the brokers' commission or fee and are commonly called "brokerage" and are allowed as a capital expenditure, just as are engineering and similar expenses. The six points between the 94 and the par represent bond discount and are the result of the fact that the company is not paying a sufficient interest on the par of the bonds to enable them to sell for their face value. In other words, the "yield to maturity" is not great enough and the buying public insists on a discount by demanding their sale at less than par. A situation like this occurs where a company sells 6% bonds in a market which for that type of enterprise requires a 7% "yield to maturity." If it were willing

to pay 7% on par, the bonds could be sold for par. The extra 1%, whether actually paid out as interest or paid as a discount at the maturity of the bonds, is actually an interest charge on bonds and should be treated the same for regulatory purposes in either event.

All of the more recent authorities appear to agree that while brokerage charges are capital items, bond discount is an interest charge which should be paid out of fair return. In Whitten & Wilcox on "Valuation of Public Service Corporations," it is stated on page 1137 (second edition):

> "* * * At first the cost of money was put forward chiefly in the form of bond discount, but analysis soon made it clear that bond discount is merely deferred interest, and therefore that the capitalization of bond discount as a part of construction cost would be a recognition of the incorrect practice of paying interest or operating expenses out of capital. True, interest during construction is recognized as a proper capital charge, but if the total amount of discount on bonds were to be capitalized, it would mean not merely the capitalization of interest during construction but the capitalization of a portion of the interest payable during the entire life of the bonds, ordinarily extending many years into the operating period. This distinction was seen by the Interstate Commerce Commission * * *."

> "This treatment of bond discount having become quite general, the claim was brought forward on behalf of the utilities that outside of bond discount there is a separable element of cost, quite distinct from it, sometimes described as broker-

age, bankers' commissions, or the cost of assembling capital.* * *."

The Supreme Court of Maine has recently examined this question and has concluded that bond discount must be regarded as a form of interest to be paid out of fair return on the property: *In Re Central Maine Power Company*, 130 Me. 28, 153 Atl. 187, 72 A. L. R. 1227 (1931). On pages 189 and 190 of the Atlantic Reporter the Court states:

> "The Commissions of Indiana, Montana, Georgia and Wisconsin have refused to permit the capitalization of bond discount as did that of Illinois until it reversed its position in a divided opinion in Re Southern Illinois Gas Co., P. U. R. 1916C, 704. The Maryland Commission, on the contrary, like that of Maine, was at first favorable to this petitioner's theory, but in Re Baltimore County Water and Electric Co., P. U. R. 1918F, 565, came to the opposite conclusion.
>
> "In Arizona, Nebraska, and New Hampshire, utilities have been permitted to issue securities based on payments of bond discount. The California commission in Re Nevada, California and Oregon Tel. & Tel. Co., P. U. R. 1927B, 662, decided that 'any expense incurred in connection with the issue of bonds should be paid out of earnings.'
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> * * *
>
> "It is perfectly legitimate for a utility to sell its bonds at less than their face value. Indeed, experience has proved that a saving in interest is effected by so doing and that such bonds are more easily marketable. But if a thousand dollar bond which could be sold at par provided it bore interest at 6 per cent. sells for $900 when paying 5 per

> cent., it is apparent that the obligor pays for the use of the $900 which it receives not only $50 annually during the life of the bond, but $100 additional at its maturity. Bond discount is therefore only another term for deferred interest."

Textbook discussions from Whitten & Wilcox above and from Ignatius on "Financing Public Service Corporations," are likewise quoted approvingly.

In *Lima Tel. and Tel. Co.* v. *P. U. C. Ohio,* 88 Ohio St. 110, 120 N. E. 330 (1918) the Supreme Court of Ohio declined to interfere with an order of the Ohio Commission refusing to allow anything for bond discount either as a capital item or as an operating expense. In *Charleston* v. *Public Service Commission,* 120 S. E. 398, P. U. R. 1924B, 601 (1923) the West Virginia Supreme Court of Appeals says: "All the authorities seem to agree that discount on securities is not a proper charge to capital, *but is simply an adjustment of interest.*" The annotator in 72 A. L. R. 1232, citing a large number of cases on the proper treatment of bond discount, has this to say:

> "The utility or public service commissions of the various states seem quite uniformly to have reached the conclusion, so far as the question appears to have been decided, that, in determining valuation of a public utility for rate-making purposes, no allowance should be made for discount on securities,—in order words, that *bond discount is not a proper charge to capital account.* * * *
>
> "Bond discount, constituting a payment for the use of money, is in the nature of an interest payment; it is not a proper capital charge, but rather

> *an adjustment of interest to the existing market conditions, and is chargeable to interest account, and not capital; so that bond discount is a matter to be considered in connection with, and to be reflected in, the rate of return allowed to a public utility;* it is a cost which should be made up out of income by the creation of a sinking fund or reserve sufficient to cover the cost during the life of the bond, and, therefore, such cost should not in equity be considered a part of the cost of reproduction or of the fair value of the utility to be taken as a basis for the fixing of rates. (Italics ours)."

The decisions of the Public Service Commissions of other states are generally in accord with the present position of this Commission, most of them holding that bond discount is to be amortized out of fair return along with the annual payments of actual interest on the bonds.

Says the Indiana Commission:

> "Bond discount, in final analysis, is interest. Bond salesmen and investors so interpret discounts, as is shown especially in the sale of short-term bonds and notes; the rate of return being computed on the basis of the rate of interest specified plus the discount translated into terms of interest per annum." *Re Citizens Telephone Company,* P. U. R. 1919 B, 352, 355.

Says the New York Commission, Second District:

> "* * * bond discount * * * clearly cannot be allowed, as that item under accepted accounting practice should be amortized out of return on

capital." *Re Syracuse & S. R. Co.,* P. U. R. 1919 A, 214, 218.

Says the Montana Commission:

> "Bond Discount * * * is not a proper item to be considered and treated as a capital investment on which the company is entitled to a return for all time, but should, in this case, be considered and treated as accrued interest, which should have been amortized and wiped out before this time * * * See Re Advance in Denver & Interurban R. Fares, P. U. R. 1918 E, 827, 831; Re Chicago, N. S. & M. R. Co., P. U. R. 1918 A, 388; Re Baltimore County Water & E. Co., P. U. R. 1918 F, 522; Louisiana *v.* Louisiana Water Co., P. U. R. 1918 B, 774; Re Mississippi River & B. T. R. Co., P. U. R. 1918 C, 321; Lamar *v.* Intermountain R. L. & P. Co., P. U. R. 1918 B, 86; Re Western Colorado Power Co., P. U. R. 1918 E, 629; Montrose *v.* Consumers Water Co., P. U. R. 1918 C, 844; Re Hydro-Electric Light & P. Co., P. U. R. 1918 A, 325; Re Chicago R. Co., P. U. R. 1919 D, 573; Re Monmouth County Water Co., P. U. R. 1919 E, 747; and Coudersport *v.* Consolidated Water Co., P. U. R. 1919 F, 196, 208." *Re Helena Light & R. Co.,* P. U. R. 1920 D, 668, 694, 695.

See also other commission practices: California: *In Re Southern Counties Gas Co.,* P. U. R. 1915 E, 197; Colorado: *Re Colorado Springs L. H. & P. Co.,* P. U. R. 1917 F, 385; Illinois: *Re Spring Valley Utilities Co.,* P. U. R. 1920 F, 139; Kansas: *Re Atchison, T., & S. F. R. Co.,* P. U. R. 1917 F, 272; Maryland: *Re Baltimore County Water and Electric Co.,* P. U. R. 1918 F, 522; Missouri: *Re Kansas City, C. C. and St. J. R.*

Co., P. U. R. 1920 B, 37; Wisconsin: *Re Wisconsin-Minnesota Light and P. Co.*, P. U. R. 1920 D, 428.

The amortization of bond discount out of operating expenses has not been allowed in rate proceedings in Pennsylvania for many years, with the exception of the original decision involving this Appellant, in which certain inconsistencies crept in as a matter of compromise. The fact that bond discount is to be regarded as the same thing a bond interest, the two of them together constituting the "yield to maturity" on which bonds are sold, has now become so well established all over the country that no one raised this question in the Superior Court and that Court allowed the amount of its own motion. It is closely tied in with the matter of cost of financing and therefore, we ask that this Court rule that it is an allowance not necessary to avoid confiscation.

CONCLUSION

The position of the Commission of Pennsylvania is that having made a valuation and prescribed a maximum gross revenue for this Appellant in 1926 when its property was new, it should not be required at this time, in order to escape the charge of confiscation of property without due process of law, to reject that valuation and make an entire new valuation based on pure estimates of cost to reproduce, in the absence of substantial evidence of previous error or of changed conditions and price levels. The evidence on the contrary is that price levels since the date of construction

have fallen rather than increased, and the criticisms of the prior decision are those which were considered before and rejected.

The prior finding of the Commission, moreover, should be regarded as res judicata of the value in 1926, although not in 1930 or 1933, in view of Appellant's appeal to the Superior Court of Pennsylvania and subsequent withdrawals thereof after argument.

Even if the prior findings of the Commission be disregarded and a value fixed now based on the evidence developed both in 1926 and recently, the evidence of original cost in 1925 outweighs the reproduction cost estimates of 1929 and 1930 and is the best evidence of value now. Appellant's specific criticisms of the old record are without weight and confuse cost with value. Its claim for increased allowances for intangible items are based on vague and indefinite calculations. Its claim for a special value for its site as the place for a toll bridge ignores the whole purpose of utility rate regulations.

The allowance of an annual depreciation charge in an amount more than enough with interest to replace the entire bridge before its useful life is over, is all that is necessary in the case of a utility which owns only one unit of property and cannot reinvest its reserve for depreciation in its own business. Particularly is this true where the fair value on which the return is allowed is determined without deduction for accrued depreciation.

Under economic conditions of the present period a fair return of 7% above Federal Income Tax payments and flood insurance is entirely adequate for this appellant.

The order of the Commission prescribes a maximum gross revenue over reasonable periods allowing reasonable variation from the specified amount. In so doing no confiscation is involved.

Discretionary allowance by the State's authorities of amounts not required to escape confiscation should be considered by this Court and credit given for them in determining if confiscation has occurred. Particularly is this true in regard to bond interest.

We respectfully submit that the judgment of the Superior Court will not result in the taking of Appellant's property without due process of law, and it consequently should be affirmed.

Respectfully submitted,

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John Fox Weiss,
Counsel.
For the Public Service Commission of the Commonwealth of Pennsylvania.

SUPREME COURT OF THE UNITED STATES.

No. 274.—October Term, 1933.

Clark's Ferry Bridge Company, Appellant, *vs.* The Public Service Commission of the Commonwealth of Pennsylvania.	Appeal from the Superior Court of the Commonwealth of Pennsylvania.

[February 5, 1934.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Superior Court of Pennsylvania affirmed (as modified) an order of the Public Service Commission of that State prescribing a tariff of tolls to be charged on the bridge of the Clark's Ferry Bridge Company over the Susquehanna River, 108 Pa. Superior Ct. 49. The Company brings this appeal.

In its review of the facts the Superior Court states that the bridge is comparatively new, having been completed in May, 1925. The bridge replaced and was constructed near the site of a wooden bridge which had been acquired by the incorporators of the present Company. In August, 1925, a complaint was filed with the Public Service Commission alleging that the rates in effect were unreasonable. By its order of June 8, 1926, the Commission found the fair value of appellant's property to be $767,800, and that appellant was entitled to receive a gross annual revenue of $85,905. on the basis of a return of 7 per cent. on that fair value, after allowing operating expenses, taxes, an annual depreciation allowance, and amortization of bond discount. An appeal from the Commission's order was taken to the Superior Court, but was withdrawn, and in February, 1927, the Company filed a new tariff. The rates thus fixed were continued in effect until July, 1929, when the Company made a voluntary reduction. In January, 1930, the Commission began the present proceeding on its own motion and, after hearings, determined that the fair value of the appellants' property, as of February 2, 1932, was still $767,800, and that the annual gross revenue which should be allowed was $84,124 on the basis of a return of 7 per cent. on that fair value, after allowing expenses and annual depreciation. 11 Pa. P. S. C.

222.[1] In this calculation, an item of $1,331 for annual bond amortization was omitted. The Superior Court held that it should be included and modified the Commission's order accordingly, that is, so as to provide that the allowable gross revenue should be $85,455.

First., Appellant contends that the Commission and the Court treated the valuation in the Commission's decision of 1926 as *res judicata* in the present proceeding. We do not so construe the Commission's report or the Court's opinion. The Commission received evidence as to alleged changes in value and estimates of the cost of reproducing the property. The Commission determined that "cost conditions" had not "changed materially" since 1926, and "upon a complete examination of the entire record in both proceedings" the Commission found that the fair value of the property was $767,800 as of February, 1932. 11 Pa. P. S. C. at p. 231. The Superior Court, in construing the action of the Commission, said: "When the subsequent complaints were filed, the Commission evidently did not consider its previous findings as barring appellant from raising the question of the fair value of its property in 1930 and the proper allowances to be made for operating expenses and depreciation, but instituted an investiga-

[1]The order of the Public Service Commission, of February 2, 1932, is as follows:

"That Clark's Ferry Bridge Company file, post and publish, effective thirty (30) days from date hereof, upon not less than one (1) day's notice to the public and this Commission, a new tariff calculated to produce an annual gross revenue of not more than $84,125.

"It is further ordered: That said tariff contains as tentative rates intended to produce said gross annual revenue of $84,125, and effective until further action by this Commission or the Company in conformity with said determination of allowable gross revenue the following charges:

"(1) A rate of 8 cents cash toll for all ordinary passenger automobiles and wagons now paying 10 cents.

"(2) A ticket without time limit salable at the rate of two for 15 cents for all such automobiles and wagons.

"(3) A 20-trip ticket non-transferable as between vehicles good any time within thirty (30) days from date of issue and salable for one dollar ($1) for all such automobiles and wagons.

"(4) Rates for all other types of vehicles as are now provided in tariff P. S. C., Pa. No. 5.

"(5) It is further ordered: That said Company file with this Commission monthly statements of income and operating expenses, showing the number of vehicles passing over its bridge in each class of traffic as contained in its tariff."

tion, and, as already stated, admitted in evidence appellant's reproduction cost estimate and its supporting testimony, and put in evidence the reproduction cost estimate of one of its engineering staff, and the report of the result of an examination of appellant's books and records". The Court acted upon what it stated to be "the legislative mandate of the amendment of June 12, 1931, P. L. 530, that in an appeal of this character, we shall consider the record and 'on [our] own independent judgment . . . determine whether or not the findings made and the valuation and rates fixed by the Commission are reasonable and proper' ". It was in this view that the Court examined the "main controversies" between the parties. 108 Pa. Superior Ct. at p. 63.

Appellant attacks the finding of fair value upon the grounds that it was based solely on the original cost of the bridge property and that the amount paid by the appellant for the bridge was less than its fair value at that time and less than its fair value in 1930. It is not open to question that the reasonable cost of the bridge is good evidence of its value at the time of construction. And we have said that "such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices". *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 411; *Los Angeles Gas Co.* v. *Railroad Commission*, 289 U. S. 287, 306. In this instance, as the state court observed, the utility is not "a complicated system which has taken years to construct and enlarge, like a waterworks, or gas works, or electric light plant, or street railway system", but is "one structure, a reenforced concrete bridge, built as it now is, without additions or improvements". It appears that the bridge was built under a contract awarded in June, 1924, after competitive bidding, and was open to traffic in May, 1925. It is manifest that when the Commission made its first decision in June, 1926, the reasonable cost of the structure furnished a proper basis for determining its fair value. Of the amount of the total valuation, at that time, of $767,800, the sum of $592,253 was taken as the construction cost on the basis of the actual outlay which included $566,301 paid to the contractor for the bridge and approaches. Appellant then insisted, and still insists, and it was shown, that the contractor sustained a loss. This was said to amount to about $143,000, that is, on labor and material, with overhead and depreciation of plant, as distinguished from a loss of profits. The evidence as to this was given by the contractor's auditor who attributed the loss to an unusual flood.

He said: "We would have made money probably if things would have gone along smoothly without any high water". The Court accepted this explanation—the only one given—stating that "A sudden rise in the Susquehanna River during the course of the work was responsible for the loss; without it there would have been a fair profit". The Court estimated that $20,000 additional, "spent on the coffer-dam construction", would probably have obviated the loss, adding—"We have increased the coffer-dam expense to cover this amount". Appellant complains that this statement was based on speculation and has no support in the record. But appellant's case is no stronger. The evidence gives no adequate ground for a conclusion that with reasonable care the loss could not have been prevented. The outstanding fact is that the contract was let in the usual way to the lowest bidder and the contractor received a substantial bonus ($22,050) for finishing the work before the stipulated date. To sustain the contention that the actual cost of the structure was less than a reasonable cost at the time, it was necessary for the appellant to give convincing proof. But such proof is lacking. We find no satisfactory basis for holding that the fair value of the property in June, 1926, was greater than $767,800 as it was then determined to be.

The question is whether the proof shows that the value was greater in 1932. Appellant relies upon the estimate of engineers as to the cost of reproduction new of the physical property, as of September 1, 1929, together with "all additional expenditures required over and above the bare cost of the physical property, to put the bridge in operation as an income-producing property". This estimate gave a total cost of reproduction new less depreciation (the estimate being exclusive of two other elements of alleged intangible value described as "attached business value" and "location value") of $875,644.30. The Commission's engineer made a similar estimate based upon prices prevailing during the last three months of 1930, which gave the cost of reproduction new, less depreciation, as $741,871. There were also charts showing the price trends for labor and materials for 1924 to 1930, inclusive. As summarized by the Court, the evidence shows "that in 1924, when the contract for the construction of the bridge was awarded, construction prices were reported as being 215% of the 1913 level; that in September, 1929, when appellant's reproduction cost estimate was made, they were 208% of the 1913 level; and that during the last three months of 1930 they fell to about 198%". It would serve no useful purpose to review the details of the

estimates of reproduction cost. The Court carefully considered them and properly concluded that the trend in prices from 1924-5, when the bridge was built, to 1931-2, when the Commission determined its present fair value, was "downward rather than upward", and that "in the absence of proof that the prices paid for the construction of the bridge were abnormally low there is no reason why in the short period of six years after its completion, with a tendency of prices for both material and labor being downward, there should be a radical increase in the fair value of the bridge for rate-making purposes". We agree with this conclusion.

It does not appear that the Court made any deduction from the amount of the fair value as determined in 1926 by reason of the depreciation accrued during the succeeding years. There was controversy as to the extent of that depreciation. Appellant's engineers allowed for the four and one-half years which had elapsed to the time of their survey the sum of $16,282. The Commission's engineer estimated the accrued depreciation for six years at $41,403. The Court thought that the latter figure was "nearer the actual accrued depreciation than the estimate of the Company", but the Court apparently treated such accrued depreciation as largely offset by the "extra allowance, over the contractor's bid, for concrete and coffer-dams". The Court decided that no harm was done the appellant by leaving the fair value at $767,800.

A distinct question is raised by a claim for what is called "the special value of location", in addition to the value of the bridge property thus far considered. This "special value" was put at $100,000. It was based, according to appellant's engineers, upon the advantage that the location of the bridge has over any other point for miles in either direction because the river is narrower and the conditions of the river bed are more favorable. The engineers made their estimate upon what they thought one would be willing to pay for the present site, in preference to other sites in the vicinity, because of the additional cost of building a bridge elsewhere. It appears that the bridge is located in a rural area. It was originally constructed as a part of an extensive transportation system built by the Commonwealth in the first half of the last century. As the Court pointed out, the right to operate a toll bridge across the river at this point or elsewhere "is fundamentally the gift of the Commonwealth, contained in appellant's franchise, and to attach a value to it would be to capitalize the franchise contrary to the provisions of the statute and the frequent decisions of the courts". In building its new bridge, appellant took advantage

of the traffic customs which had already been established. In the determination of the value of its property appellant was entitled to be allowed the fair market value of its real estate for all its available uses and purposes, which would include any element of value that it might have by reason of special adaptation to particular uses. But it was not entitled to an increase over this fair market value by virtue of the public use. *Minnesota Rate Cases*, 230 U. S. 352, 451, *et seq.* The evidence, so far as it was properly addressed to the question of the fair market value of appellant's real estate, tended to support the amount allowed in the estimate of fair value reached by the Commission and the Court, and afforded no basis for a higher valuation. There is no warrant for an increase of fair market value by reason of opinions as to what it would cost to build a bridge elsewhere.

We conclude that appellant has failed to show confiscation because of the amount used as a rate base.

Second. Appellant complains that the amount prescribed for gross revenue is inadequate. Appellant contests the annual allowance for depreciation and the rate at which the fair return is calculated.

The Commission fixed the annual depreciation allowance at $7,678 and the Court approved it. This amount equals one per cent of the fair value. Appellant contends that the allowance should be 2½ per cent of the value of the depreciable property on the straight line basis. The difference—on appellant's calculation of the fair value—amounts to $13,434. The Court approved the ruling of the Commission.

There is no question as to the fact of depreciation. It was established, as respondent admits, that concrete bridges deteriorate from the moment of their completion; that there are chemical changes in their structure, absorptions of moisture and oxidation, both within the concrete and in the reenforcing iron covered by it, which cannot be stopped in their process or their effects removed. With this understanding, the question is as to the amount which should annually be allowed which will serve adequately to protect the investment from impairment due to age and use. Testimony was given by one of appellant's engineers that the average life of a concrete bridge was from 30 to 50 years; by another, that the period for which this bridge might be expected to remain useful was "from 40 to 80 years,"—he "would not figure on over 40". Another testified that physically the bridge "might have a life of

50 to 100 years". The Commission's engineer estimated its life at from 40 to 50 years; for his computation he took an expectancy of 45 years. Respondent urges that the annual allowance asked by appellant was plainly too large and contrasts it with appellant's claim for accrued depreciation; that is, as the Court stated, appellant's engineers "allow an accrued depreciation for the four and a half years elapsing to the time of their survey of $16,282, but claim a *yearly* depreciation allowance thereafter of $21,210". While it is recognized that accrued depreciation, as it may be observed and estimated at a given time, and an appropriate allowance of depreciation according to good accounting practice, need not be the same, there is no rule which requires an allowance to be made or continued which in the light of experience is shown to be extravagant. *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 158. After reviewing the testimony, and the methods of calculation which the parties respectively advocated, the Court thus stated its conclusion: "It [the Commission] allowed $7,678 annually. This sum set aside each year, with 4% *simple* interest will in fifty years produce approximately $767,800, sufficient to rebuild the bridge as now valued. The straight line method advocated by the Company will in fifty years with 4% simple interest produce a fund twice as great as that necessary to replace the bridge. The straight line method is often used for short-lived structures, or plants of a character that they can be restored from time to time to the original condition of efficiency. . . . It is not so fair or equitable when applied to a long-lived structure or one that is disintegrating gradually and continuously and not capable of being restored to its original condition. The company may not be required to apply the income received from the depreciation fund to make up any deficit of operation (*Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U. S. 23), but it is not entitled to an allowance, which exclusive of interest earned on the fund, will be sufficient to rebuild the bridge, when its life is done, but only to such an allowance as will with reasonable interest added make a fund sufficient to replace the bridge when it requires replacement". In this view, the Court thought the amount allowed by the Commission to be "fair and reasonable in the circumstances". The Court added that the Commission had included in its allowance for operating expenses an item of $1,800 for "maintenance".

The question of the amount which should be allowed annually for depreciation is a question of fact. *Georgia Railway & Power*